



# ROADMAPS TO REFORMING THE UN DRUG CONVENTIONS

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<sup>1</sup> Room, R. (2012) "Reform by subtraction: The path of denunciation of international drug treaties and reaccession with reservations", *Int J Drug Policy* 23(5):401–406.

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## Preface

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THE IDEA FOR this Report came in 2010, when I was travelling with Professors Robin Room and Peter Reuter in Washington DC and Latin America to disseminate the *Report* of the Beckley Foundation's *Global Cannabis Commission*.<sup>1</sup> Under the leadership of Robin Room, the *Commission* had drawn up a *Draft Framework Convention on Cannabis Control*, based on the World Health Organization's *Framework Convention on Tobacco Control*. During the trip I fomed the idea of a *Global Initiative for Drug Policy Reform*, which would commission major new reports, and bring together high-level representatives of countries that had implemented reforms, countries interested in experimenting with reform, and members of the *Latin American Commission on Drugs and Democracy* (which later became the *Global Commission on Drug Policy*). For the *Initiative's* first Report, I asked Robin if he would expand the work of the *Cannabis Commission* to examine the control and regulation of all substances that fall under the UN Drug Conventions.

When *Roadmaps for Reforming the UN Drug Conventions* was commissioned in 2010, radical reform of drug policy was very much a long-term aspiration, and the scenarios delineated here might have appeared hypothetical. However, progress over the intervening two years has been so rapid, and so far-reaching, that today this volume is of clear practical relevance.

The clamour for change has been spearheaded by Latin America, particularly by the leaders of drug-producing and transit countries, where the corrupting and lethal effects of the illicit drug trade that thrives under prohibition are most keenly felt. In July 2012, at the invitation of President Otto Pérez Molina, the Beckley Foundation set up its *Latin American Chapter* in Guatemala, in order to work with the President and his Government on the development of a range of alternative policy options aimed at reducing violence and corruption in the region.

At the UN General Assembly in September 2012, President Santos of Colombia, President Calderón of Mexico and President Pérez Molina of Guatemala all spoke of the urgent need to explore alternatives to the War on Drugs. A proposal to create the world's first legal, non-medical, regulated market in cannabis was taken to the Congress of Uruguay in November. In the same month, the tide of change breached the confines of Latin America, as voters in Washington and Colorado voted to legalise the cultivation and possession of limited amounts of cannabis for non-medical use. At the time of writing, it remains unclear how the US Federal Government will respond to the demand of these recalcitrant states.

There are various approaches to harnessing the growing tide of reform. The most immediate is to work inside the 'wriggle room' that exists within the UN Drug Conventions.<sup>2</sup> This process of testing the boundaries of what is possible has already begun, creating tensions in the international drug control regime. The UN's quasi-judicial monitoring body, the International Narcotics Control Board, has aimed sharp criticisms at the practices of a number of countries, including the USA, Canada, Australia, and several in Europe and Latin

<sup>1</sup> Room, R. *et al.*, *Cannabis Policy: Moving Beyond Stalemate*, first published in 2008 as a Beckley Report, and co-published in 2010 by the Beckley Foundation Press with Oxford University Press.

<sup>2</sup> For a review, see Bewley-Taylor, D and Martin Jelsma, "The Limits of Latitude", *Series on Legislative Reform of Drug Policies* No. 18. Transnational Institute, March 2012.

America. Many of them have in turn mounted vigorous defences of their reforms. It is becoming increasingly apparent, in other words, that in the past two years, significant cracks have opened up in the previously unassailable stronghold of international control.

In parallel with this stretching of the boundaries, countries need to consider how their international treaty obligations might be amended – principally because there are severe constraints on how much can be achieved within the room for manoeuvre allowed by the current system. As the cracks continue to widen and the *status quo* begins to crumble, it is important for countries to be aware of what alternatives are open to them.

This Report provides a framework for the development of such alternatives, explaining how countries might amend their international obligations in order to allow them more freedom to formulate national policies that better suit their special needs, in place of the ‘one-size-fits-all’ policies currently mandated by the UN Drug Conventions of 1961, 1971 and 1988. In particular, Room and MacKay explore how countries could be afforded the freedom to adopt, within their own borders, policies that i) clearly and explicitly decriminalise the possession and use of one or more currently controlled substances; or ii) create a strictly regulated, legal, non-medical market in one or more currently controlled substances.

The authors suggest two mechanisms by which these changes could be brought about. In Chapter 6, Robin Room proposes that, by *denouncing* (i.e. withdrawing from) one or more of the Conventions and immediately *re-acceding* with reservations, countries could remove themselves from the scope of specific treaty clauses, while remaining committed to the remainder of their existing obligations. He calls this method ‘reform by subtraction’, because it subtracts from the wording that binds a party, but does not permit the modification or creation of treaty wording. This is the path that Bolivia has taken in respect of coca-leaf.

In Chapter 5, by contrast, Sarah MacKay shows how treaty clauses might be amended and/or created in order to permit a country – or, better still, a *group* of countries acting together – the freedom required to formulate policies that better suit their domestic needs.

The ideas put forward in this Report raise a number of legal and practical questions. On what grounds might countries seek to modify their international obligations? How would amendments be enacted in practice? What would be the legal effect of adopting measures that conflict with existing obligations? In the process of reform, how would the rights of countries who did not wish to change the present system be assured? The authors give detailed consideration to all of these questions, making this Report as practical as much as an academic document.

The UN Drug Conventions were supposed to protect the world from the risks associated with problem drug use, while safeguarding the supply of essential medicines. But illicit drugs are cheaper, purer and more available than ever before; and a handful of rich nations consume over 90% of the world’s opioid analgesics, leaving the majority of countries with little or no access to them. Moreover, global prohibitionism has had *devastating* unintended consequences, including conflict and death, corruption and environmental destruction.

By regarding the Conventions as immutable, we have turned what should have been a noble servant into a brutal master. It is time for the nations of the world to reconsider and reassert control, harnessing the organs of international diplomacy for the benefit of mankind.

*Amanda Feilding, 2012*

# PART I. POSSIBLE ROADMAPS





## Chapter I. Envisioning alternative futures

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THE YEAR 2012 is the centennial of the Hague Opium Convention, which initiated what we now know as the international drug control system, and 2011 was the fiftieth anniversary of the Single Convention on Narcotic Drugs. Nearly everyone now alive thus grew up in a world governed by the international drug conventions, and the great majority grew up in an era when drug policies everywhere were governed by the more restrictive regime initiated by the 1961 Convention.

From the point of view of international politics, the regime has been a success. Nearly every country in the world is a party to the three main current drug treaties, of 1961, 1971 and 1988, and blatant official deviations from the treaties' provisions are rare. The list of treaties which have attained such a degree of universality is short.

From the point of view of one of the main aims of the system – assuring the medical supply of psychoactive substance needed for pain relief and other medical uses – the regime has been a partial success. In rich countries, there is no lack of medications for pain relief. But the World Health Organization estimates that 80% of the world's population, particularly those living in poorer countries, lack adequate access to treatment for moderate or severe pain.<sup>4</sup> This is not simply a matter of lack of resources. As the WHO report notes, 'in some countries, regulations prevent doctors from prescribing the appropriate substance and in sufficient amounts. Doctors may even fear arrest if they carry controlled medicines for treating their patients. Regulations can make obtaining prescription forms difficult, while restrictions on the number of pharmacies that are allowed to dispense controlled substances may serve to significantly reduce the availability of controlled substances. The administrative burden related to the manufacture, import, trade and distribution of controlled medicines can also be prohibitive.' Restrictions and burdens such as these are not solely attributable to the international treaty system, but its general orientation and actions have encouraged and facilitated these results.

From the point of view of the other main aim of the system – confining the production, distribution and use of controlled substances to use for medical and scientific purposes, and eliminating markets and use for other purposes – the system has been a failure. As the Interpol representative put it at a session of the Commission on Narcotic Drugs in 1995, 'as the years go by, there is no real improvement in the situation.... Next year we

<sup>4</sup> World Health Organization. *Improving Access to Medications Controlled under International Drug Conventions*. Briefing note. Geneva: Access to Controlled Medications Programme, WHO, 2007. [http://www.who.int/medicines/areas/quality\\_safety/access\\_to\\_controlled\\_medications\\_brnote\\_english.pdf](http://www.who.int/medicines/areas/quality_safety/access_to_controlled_medications_brnote_english.pdf) (accessed 21 August, 2011) .

hope for serious progress, but we can't report it today'.<sup>5</sup> In a 1998 UN General Assembly Special Session, the international system committed itself to the more limited goal of 'eliminating or significantly reducing the illicit cultivation of coca bush, the cannabis plant and the opium poppy by the year 2008'. In 2009, it was clear that this goal was as distant as it had been ten years before.<sup>6</sup>

The usual response from those leading the system is to call for redoubled effort. But, after half a century of what has been in the long run an exercise in futility, the time has come to consider and try alternatives.

There are two basic difficulties in going down this path, one of them conceptual and the other practical. The practical issue, as we shall discuss, is that the treaties are very hard to change. And since the treaties' restrictions on legislative options apply to domestic laws as well as at the international level, the treaties effectively block experimentation outside their constraints at national or subnational levels.

The conceptual issue is the difficulty of imagining alternative futures, in a world which has been governed and structured by rules set half a century and more ago. Particularly concerning the international level, the literature on alternatives to the present system has been very limited. In looking back to the period before the system was in place, Kettil Bruun and his colleagues brought to light a relevant issue.<sup>7</sup> They pointed out that the first international drug control treaty actually was concerned with alcohol, not with opium or other substances, reflecting that it was around alcohol that the ideal of international prohibition first developed.<sup>8</sup> But there have been relatively few analyses which look across international governance regimes for all psychoactive substances, including tobacco and alcohol, the two psychoactive substances which each make a greater contribution to the global burden of disease than all the controlled drugs together.<sup>9</sup> In Chapter 4 of this book, we will return to this broader frame, but simply

<sup>5</sup> Quoted in: Room, R., 'The rhetoric of international drug control', *Substance Use and Misuse* 34:1689–1707, 1999.

<sup>6</sup> Reuter, P., Trautmann, F., Pacula, R., Kilmer, B., Gageldonk, A. & van der Gouwe, D., *Assessing Changes in Global Drug Problems, 1998–2007: Main Report*. Santa Monica: RAND Corporation, 2009. [http://www.rand.org/pubs/technical\\_reports/2009/RAND\\_TR704.pdf](http://www.rand.org/pubs/technical_reports/2009/RAND_TR704.pdf) (accessed 21 August, 2011).

<sup>7</sup> Bruun, K., Pan, L. & Rexed, I., *The Gentlemen's Club: International Control of Drugs and Alcohol*. Chicago & London: University of Chicago Press, 1975.

<sup>8</sup> Schrad, M.L., *The Political Power of Bad Ideas: Networks, Institutions, and the Global Prohibition Wave*. Oxford, etc.: Oxford University Press, 2010.

<sup>9</sup> Lim, S.S., Vos, T., Flaxman, A.D., Danae, G. Shibuye, K et al., 'The burden of disease and injury attributable to 67 risk factors and risk factor clusters in 21 regions 1990–2010: a systematic analysis', *Lancet* 380:2224–2260, 2012.

note for the moment that there are still relatively few analyses from recent times with this broader international perspective.<sup>10</sup>

Even confining our attention to the substances currently under international control, as we do elsewhere in this book, work on developing alternative futures at the international level has been relatively limited. An appendix to a ‘blueprint for regulation’ published by Transform Drug Policy Foundation discusses ‘options for reforming the UN drug control system’, but only in general terms.<sup>11</sup> Similarly, a book on ‘latitude’ and ‘possibilities for reform’ in the drug treaties considers only the procedures for amendment and reservations to the treaties, but does not venture into laying out how substantive changes might read.<sup>12</sup> In a recent work on *Cannabis Policy*, a team including the first author of this book went into more detail, laying out a Draft Framework Convention on Cannabis Control, modeled on the WHO Framework Convention on Tobacco Control<sup>13</sup> with respect to provisions concerning domestic laws and markets, but keeping the 1961 Convention’s provisions in place with respect to trade and international dealings concerning cannabis.<sup>14</sup> However, the proposed treaty did not deal with any other drugs.

The basic purpose of the present book, then, is to contribute ideas and concrete language concerning alternatives to the present international drug control system, and to discuss the possible means by which such changes could be made. The options we lay out aim to preserve important aspects of the current system. These include placing limits on commercial markets in psychoactive substances with the aim of limiting harms from them; ensuring supply of pain relief and other psychoactive medications; and keeping the principle of international comity, where signatory nations do not undercut and indeed act to support each others’ control regimes, whether they are regulatory or prohibitory. In addition, the options aim to move beyond the current system in several ways. These include increasing the autonomy and flexibility of nations in their domestic arrangements concerning the substance; in the case of the second option, enabling the creation of domestic regulated markets in one or more substances; and more generally enabling more humane and effective responses to the needs of individual drug users.

<sup>10</sup> See, for example: pp. 360–398 in: Braithwaite, J. & Drahos, P., *Global Business Regulation*. Cambridge, etc.: Cambridge University Press, 2000; and Room, R., ‘International control of alcohol: alternative paths forward’, *Drug and Alcohol Review* 25:581–95, 2006.

<sup>11</sup> Rolles, S., *After the War on Drugs: Blueprint for Regulation*. Bristol, UK: Transform Drug Policy Foundation, 2009.

<sup>12</sup> De Ruyver, B., Vermeulen, G., Vander Beken, T., Vender Laenen, F & Geenens, K. *Multidisciplinary Drug Policies and the UN Drug Treaties*. Antwerp & Apeldoorn: Maklu, 2002.

<sup>13</sup> WHO (2003) *WHO Framework Convention on Tobacco Control*. Geneva: WHO, 2003. [http://www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf) (accessed 21 August, 2011).

<sup>14</sup> Room, R., Fischer, B., Hall, W., Lenton, S. & Reuter, P., *Cannabis Policy: Moving beyond Stalemate*, pp. 159–91. Oxford: Beckley Foundation Press and Oxford University Press, 2010.

We do not underestimate the difficulties involved in bringing what we propose to actuality, for instance by enacting the changes in treaty language that we propose. But change is not likely without a vision of what the new dispensation would be. So in the core of this book we offer concrete ideas and detailed language about what relatively limited changes in the international drug regime could look like. In Chapter 4, we also offer some ideas and principles for discussion concerning what the shape of a more thoroughgoing change might be.

At the end of his 2001 monograph on *Penal Aspects of the UN Drug Conventions*, Boister concludes that the 'pressing question [is] how to reform the international war on drugs.... What is needed is an expansion of the options and a concretisation of that expansion in international law in order to open international society's mind about drugs'.<sup>15</sup> The aim of this book is to do just that.

<sup>15</sup> Boister, N., *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, pp. 547–548.

## Chapter 2. The present system, and directions for reform

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THE PRESENT SYSTEM consists of three Conventions:

- the 1961 *Single Convention on Narcotic Drugs* (and a 1972 protocol amending it), primarily covering opium and its derivatives, coca bush derivatives, notably cocaine, and cannabis
- The 1971 *Convention on Psychotropic Substances*, covering a wide range of manufactured psychoactive medications used pharmaceutically, including amphetamines and benzodiazepides, as well as LSD and other psychedelic substances
- The 1988 *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, primarily aiming to suppress illicit trafficking and including provisions attacking money-laundering and controlling precursors to drugs controlled under the 1961 and 1971 conventions, and also including a requirement that possession or purchase of controlled drugs be criminalised.<sup>16</sup>

As the 1961 Convention's name spells out, it aimed to consolidate the confused tangle of conventions, agreements and protocols which had accrued in the intervening half-century since the Opium Convention. But, as Bewley-Taylor and Jelsma have persuasively argued,<sup>17</sup> the Single Convention was more than just a consolidation: while previous treaties had been 'concerned predominantly with the regulation of the licit trade and the availability for medical purposes of a range of drugs', the Single Convention considerably extended the scope of proscription, gaining wide international agreement on requirements for national penal provisions for many activities. This orientation of the Single Convention served as the frame for further extensions by the two later treaties.

The resulting system thus goes far beyond the customary concerns of international laws with regulating trade and other relations between nations – although the regulation of trade in psychoactive substances is indeed one aspect of the treaties.<sup>18</sup> The treaty system

<sup>16</sup> The treaties, the Single Convention on Narcotic Drugs (as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971, and the United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, are conveniently collected in: United Nations Office on Drugs and Crime, *The International Drug Control Conventions*, New York: United Nations, 2009. <http://www.unodc.org/unodc/en/treaties/index.html> (accessed 2 July, 2012).

<sup>17</sup> Bewley-Taylor, D. & Jelsma, M., *Fifty Years of the 1961 Single Conventions on Narcotic Drugs: A Reinterpretation*, Amsterdam: Transnational Institute, Series on Legislative Reform of Drug Policies, No. 12, March 2011. [www.tni.org/sites/www.tni.org/files/download/dlr12.pdf](http://www.tni.org/sites/www.tni.org/files/download/dlr12.pdf) (accessed 8 July, 2012).

<sup>18</sup> Babor, T., Caulkins, J., Edwards, G., Fischer, B., Foxcroft, D., Humphreys, K., Obot, I., Rehm, J., Reuter, P., Room, R., Rossow, I. & Strang, J., *Drug Policy and the Public Good*, p. 212. Oxford, etc.: Oxford University Press, 2010.

also imposes requirements concerning the laws and controls that countries must apply domestically.

There are two particular constraints which the treaties impose on countries that have acceded to the conventions without reservations. First, there are provisions requiring that use and possession of controlled drugs must be prohibited for other than medical and scientific purposes, and that possession must be a criminal offence. While the 1961 Convention already required that states 'shall not permit' the possession of drugs except as authorised for medical and scientific purposes, it is the 1988 Convention which specifically requires signatory nations to 'establish [possession] as a criminal offence under domestic law'. With the growth of recreational use of controlled substances in affluent countries in the late 1960s and afterwards, the treaty provisions required the criminalisation of behaviour that was widespread among young adults. Many governments came to see this situation as undesirable and untenable, in earlier years particularly concerning cannabis, and more recently concerning other drugs as well. There have been a wide variety of efforts in different places to step back in one way or another from the criminal-offence requirement,<sup>19</sup> and a number of discussions of how the treaty provisions can be interpreted.<sup>20</sup> But the treaty provisions have substantially constrained and structured national and local reform efforts to decriminalise possession. The result often has been compromise provisions which lower penalties but often end up being more widely applied ('net-widening', in the parlance of criminologists). The reforms have generally retained some penalties for possession of small quantities, even if they are not defined as criminal offences, to stay in conformity with the international treaties. Often these penalties have been easier for police to invoke than the former criminal offences were, and so have been applied more widely. Then a penalty of a fine, for instance, escalates if it is not paid, and the result is more young people with a police record than previously.<sup>21</sup> For this and other reasons, arrests for cannabis possession have risen in many places in recent years, even where the official policy appears to have become more tolerant.<sup>22</sup>

Second, the treaties require that signatory nations must forbid any domestic market in the substances, other than for medical or scientific purposes. The provisions forbidding a domestic market have meant that no nation has a fully-formed system of regulatory control of these substances for any purpose other than for medical use.<sup>23</sup>

<sup>19</sup> See Room, R., Fischer, B., Hall, W., Lenton, S. & Reuter, P., *Cannabis Policy: Moving beyond Stalemate*, pp. 75–106. Oxford, etc.: Oxford University Press and Beckley Foundation, 2010.

<sup>20</sup> E.g., Krajewski, K., 'How flexible are the United Nations drug conventions?' *International Journal of Drug Policy* 10:329–338, 1999.

<sup>21</sup> E.g., Christie, P. & Ali, R., 'Offences under the Cannabis Expiation Notice Scheme in South Australia'. *Drug and Alcohol Review* 19(3):251–256, 2000.

<sup>22</sup> Room et al., 2010, p. 63.

<sup>23</sup> The Dutch system of "coffee shops" for cannabis has *de facto* legalised a market for small retail transactions, but there is no provision for legal supply of the coffee shops (see text). The licensed cannabis shops in several Indian states rely for their compliance with international law on a

These treaty provisions have substantially constrained the ability of national and local governments to experiment with legal or regulatory changes. Even where governments have pushed the envelope of compliance, they have felt constrained to do so in such a way that they could argue they were still in compliance. Thus the Dutch coffee-shop system for cannabis, perhaps the most celebrated example of pushing the envelope, did not repeal the crime of possession of cannabis, which remains on the books. There was simply an administrative decision that in specified circumstances the police would not enforce the law. And though there is a *de facto* legality about retail sales within specified limits in the coffee shop system, the unsolved issue of the Dutch system is the ‘backdoor problem’: that there is no legal provision for growing and supplying cannabis to the coffee shops, so that the cannabis which is *de facto* legalised at the front of the coffee shop must have come to the shop illegally.<sup>24</sup> This anomaly was built into the Dutch system because there was no way for the problem to be solved within the constraints of the international treaties. The international treaties, then, have blocked experimentation with regulated domestic drug markets, and have constrained efforts by governments to decriminalise possession of controlled drugs for personal use.

In the proposals in following chapters for revision of the treaties, we have accepted and taken into account the international interest expressed in the treaties in controlling international trade in the substances controlled by the treaties. However, we do not regard an individual’s possession and use of a controlled drug in quantities for personal use as a matter of substantial interest from the point of view of international trade or smuggling. Decriminalising personal use and associated actions are the focus of one series of options we have laid out in what follows. The revisions suggested under this series of options relate only to possession and other acts (including cultivation, production, supply and acquisition) undertaken for non-commercial purposes and involving small amounts of drugs. The studies which have been done on the effects of decriminalising or recriminalising personal possession, primarily concerning cannabis, have found no general effect of this change on levels of use in the jurisdiction.<sup>25</sup> Thus allowing personal possession in one country seems unlikely in itself to have a substantial effect in another country.

In the second series of options discussed below, creating the possibility for a legal and regulated market in one or more controlled substances within a country, commercial interests involved in the market may well have an interest in expanding beyond the

distinction in the international treaties concerning which parts of the cannabis plant are under international control – see Chapter 3, section 2.2 below.

<sup>24</sup> Korf, D.J., ‘An open front door: the coffee shop phenomenon in the Netherlands’. In: Rødner Sznitman, S., Olsson, B. and Room, R., eds., *A Cannabis Reader: Global Issues and Local Experiences – Perspectives on Cannabis Controversies, Treatment and Regulation in Europe*, vol. 1, pp. 140–154. EMCCDA Monograph No. 8. Luxembourg: Office for Official Publications of the European Communities, 2008. <http://dare.uva.nl/document/133722> (accessed 8 July, 2012)

<sup>25</sup> Room, R. & Reuter, P., ‘How well do the international drug conventions affect the public health?’ *The Lancet* 379 (Jan. 7):84–91, 2012.



domestic market, just as producers of controlled medications in the present system have such interests. It will remain the responsibility of a country under the treaties to license and regulate such commercial interests, and to require them to follow the present system of exporting only when there is a legitimate import permit. The threat of removal of a license to operate is a powerful tool to influence the behaviour of legitimate commercial interests.

In the options discussed below, we have thus left intact the very detailed requirements, particularly in the 1961 treaty, dealing with international trade in the controlled substances. Permitting possession and other acts for non-medical personal use would be largely irrelevant to these requirements, but in the case of a regulated domestic market the requirements take on particular relevance. The principle we have followed is that international comity should be preserved with respect to these controlled substances. That is, unlike the situation for cigarettes and alcohol for instance, nations should remain responsible under the amended treaties for not abetting or allowing export to a jurisdiction which is not willing to license its importation. This is a requirement which extends far beyond expectations in international law for almost all other commodities, apart from atomic weapons.

The general aim of the proposals for change which we present in the following chapters is to open up the possibility of policy experimentation at the national level or (where national laws allow it) at subnational levels. Our expectation is that in the course of time a number of experiments or initiatives will be undertaken. It will be important to evaluate the effects of these changes in order to build a body of knowledge about the effects of different legal and regulatory arrangements on levels of population harm from drug use.

If one thinks of social issues on which there has been a major shift in practice in the last century or so, typically the move has first been made in bellwether nations or subnational jurisdictions. Examples of changes mostly in one direction, as mores change, are numerous. This was true for votes for women, for elimination of the death penalty, for blood-alcohol limits for drivers, for universal health care coverage, and for banning smoking indoors in public places, to cite just a few instances. On other policy issues, movement has been in both directions, for instance for whether a medication requires a prescription, for hours of sale of alcoholic beverages, and for laws on sale of guns. For commodities other than those subject to the drug conventions the claims for the competing values of individual autonomy and choice versus public health and order have played out differently in different cultures and times. It may be expected the same would be true for the controlled substances if provisions for a regulated domestic market are allowed to vary at a national level. The present provisions of the drug conventions effectively block such experimentation and prevent experimental diversity at national or subnational levels.

## Chapter 3. Paths forward for nations seeking treaty reform

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### 1. AN ABUNDANCE OF CHOICES, AT LEAST IN THEORY

IN PRINCIPLE, there are many ways in which countries or groups of countries could change the present system of treaties, or change their status with respect to them. In practice, all the ways pose substantial difficulties, but some seem clearly more feasible than others, in terms of action in the short to medium term. In this chapter, we discuss the main paths which are open to Parties to the treaties to act, and considerations that should be taken into account in choosing each path. The reader is also referred to a related previous discussion, which was focused on possible paths of change specifically for cannabis.<sup>26</sup> We discuss first actions which involve change of the system as a whole, and thus must be agreed to by a majority or more of the Parties to the conventions. We then consider actions which can be taken by a single Party, although these can also be undertaken in cooperation between Parties.

### 2. ACTIONS INVOLVING CHANGE IN THE SYSTEM

#### 2.1 Amendment

Each of the three treaties sets out procedures for amendment. 'Any Party may propose an amendment' to the 1961 treaty (Art. 47, § 1). The Economic and Social Council (ECOSOC) of the UN may then ask Parties if there is unanimous support, and failing that, may decide to call a conference to discuss the proposed amendment. A similar procedure is provided in the 1971 treaty (Art. 30), but with a little more spelling out (the proposed amendment enters into force if no party has rejected it within 18 months). ECOSOC has the power to decide whether a conference of Parties should be called, either immediately, or after an 18-month period for comment in which one or more Parties reject the change. The 1988 treaty (Art. 31) has a 24-month comment period, with an option for ECOSOC to call a conference thereafter if a majority of Parties request that this be done. Any amendment of the 1988 treaty has to be specifically consented to by a Party for it to enter in force in respect to that Party.

The only successful amendment there has been to the treaties was the 1972 Protocol to the 1961 treaty, agreed on at the time of adoption of the 1971 convention.<sup>27</sup> The 1972

<sup>26</sup> Room, R., Fischer, B., Hall, W., Lenton, S. & Reuter, P. *Cannabis Policy: Moving beyond Stalemate*. Oxford: Beckley Foundation Press and Oxford University Press, 2010.

<sup>27</sup> For most purposes here, the discussion is in terms of three treaties, with the 1961 treaty as amended being treated as a whole. However, for some purposes, notably the discussion of reservations, there are actually four texts and reservations to be dealt with. The 1971 and 1988 treaties, and the 1961 treaty as amended by the 1972 Protocol, can be found, as noted above, at

Protocol strengthened some provisions of the 1961 treaty, though not to the extent that had been hoped for by the U.S., which had convened a plenipotentiary conference with 97 states in attendance.<sup>28</sup>

Other than this, the only attempt to amend the treaties has been in 2009 by Bolivia, which filed a proposal to amend the 1961 treaty by removing coca chewing, the traditional practice of chewing the coca leaf, from its scope. In the wake of this, 'the U.S. convened a group of 'friends of the convention' to rally against' the proposal, and in the end 18 countries, mostly from Europe and North America and including all of the G-8, the economically most powerful nations, filed objections to the proposal by the deadline at the end of January, 2011.<sup>29</sup> While ECOSOC could then have called a conference of Parties to consider the proposal, in the event Bolivia moved instead on 29 June, 2011 to use an alternative procedure, to be discussed below, by formally announcing its denunciation of the treaty, to take effect on 1 January, 2012, with a plan to reaccede then with a reservation concerning coca leaf.<sup>30</sup>

A proposal to amend can of course be made by a single Party (as in the Bolivian case), or alternatively by multiple parties, but actual amendment requires either unanimous consent (no objections within the specified time) or a vote in a conference of Parties. Since the provisions differ for the three treaties, for any proposal which involves more than one treaty there would probably have to be separate handling for each treaty in the amendment process. A proposal which involves change to all three treaties would presumably face a delay of up to 24 months before the decision on whether to call a conference of parties could be made. For the 1988 treaty, a positive request for such a conference would be required from a majority of Parties and a majority of the ECOSOC.

As the Bolivian initiative illustrates, such changes would be unlikely to be approved by consensus, that is, by no Party filing an objection in the allowed time periods. In short, the process specified in the treaties for moving to either of the sets of options discussed below by amendment of the treaties is unwieldy and, on recent experience, very unlikely to succeed.

<http://www.unodc.org/unodc/en/treaties/index.html> or on the INCB website, <http://www.incb.org>. The original texts of the 1961 treaty and the 1972 Protocol can be found at [http://www.paclii.org/cgi-bin/dispatch.pl/pits/en/treaty\\_database/1961/7.html](http://www.paclii.org/cgi-bin/dispatch.pl/pits/en/treaty_database/1961/7.html) and [http://www.paclii.org/pits/en/treaty\\_database/1972/7.html](http://www.paclii.org/pits/en/treaty_database/1972/7.html), respectively (both accessed 2 July, 2011).

<sup>28</sup> Bewley-Taylor, D. & Jelsma, M., *Fifty Years of the 1961 Single Conventions on Narcotic Drugs: A Reinterpretation*, Amsterdam: Transnational Institute, Series on Legislative Reform of Drug Policies, No. 12, March 2011. [www.tni.org/sites/www.tni.org/files/download/dlr12.pdf](http://www.tni.org/sites/www.tni.org/files/download/dlr12.pdf) (accessed 2 July, 2012)

<sup>29</sup> Jelsma, M. *Lifting the Ban on Coca Chewing: Bolivia's Proposal to Amend the 1961 Single Convention*. Amsterdam: Transnational Institute, Series on Legislative Reform of Drug Policies, No. 11, March 2011. [www.tni.org/files/download/dlr11.pdf](http://www.tni.org/files/download/dlr11.pdf) (accessed 2 July, 2012)

<sup>30</sup> International Drug Policy Consortium, *Bolivia's legal reconciliation with the UN Single Convention on Narcotic Drugs*. IDPC Advocacy Note. London: IDPC, July 2011. <http://www.druglawreform.info/en/home/item/2627-bolivias-legal-reconciliation-with-the-un-single-convention-on-narcotic-drugs> (accessed 2 July, 2012)

## 2.2 Changing the status of one or more substances under the treaties

A psychoactive substance could in principle be removed from the scope of the treaties by removing it from any of the schedules of the 1961 and 1971 treaties. This would require the recommendations of a WHO Expert Committee (transmitted through the WHO Director-General), and approval by a majority vote in the Commission on Narcotic Drugs (CND), and then in the ECOSOC, if any Party appealed the CND decision there. In the specific cases of cannabis, coca and opium, there would still be provisions in force in the 1961 treaty that require state control of licensing and production and a state monopoly wholesaler.

The provisions on ‘changes in the scope of control’ in the 1961 treaty allow for the possibility of ‘deleting a drug... from a Schedule’, but this would require that the WHO find that the substance is **not** ‘liable to similar abuse and productive of similar ill effects’ as the other drugs listed in the schedules accompanying the treaty (Art. 3, §§6, 3). Similarly, although the main emphasis in the 1971 treaty is on adding substances to the schedules, there is mention of the possibility to ‘delete’ a substance from the schedules (Art. 2, §6). However, recommendations from WHO are subject to approval by the Commission on Narcotic Drugs under both treaties, and also subject to a possible appeal to ECOSOC under the 1971 treaty.

The recent history of relevant actions under these provisions of the international system does not suggest a likelihood of success in removing psychoactive substances with substantial patterns of use from the scope of the treaties. For example, the 2006 WHO Expert Committee’s recommendation to transfer dronabinol (also known as THC), a medication which is the primary psychoactive ingredient in cannabis, to a less restrictive schedule of the 1971 treaty (from II to III) was rejected by the 2007 Commission on Narcotic Drugs.<sup>31</sup>

It may be noted that with respect to cannabis there is another option, which does not require reclassification in the treaties. The option for any nation is to legalise forms of cannabis that fall outside the restrictive definition of ‘cannabis’ in the 1961 Convention. The ‘cannabis’ which is controlled under the 1961 Convention is defined as ‘the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated’ (Art. 1, §1(b)). Parties to the treaty are thus not required to outlaw or criminalise cultivation or use of cannabis leaves for whatever purpose (presumably the flowering or fruiting tops must be discarded or put to medical use to comply with the Convention). There is likewise no prohibition on providing for a legal market in cannabis leaves.<sup>32</sup> Cannabis leaves have some psychoactivity when consumed,

<sup>31</sup> Room et al., 2010, p. 11.

<sup>32</sup> Article 28 (3) of the 1961 Convention states that “the Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant”. This is discussed below in section 4.11 of the Appendix. As noted there, the official Commentary clearly recognises that non-medical use of the leaves is not forbidden by this article.

but considerably less potency than such forms as resin or sinsemilla; samples of 'herbal cannabis' seized by police in England in 2005 had a median potency of 2.1% of THC, though one sample had 11.8%.<sup>33</sup> It is under the definition of cannabis in the 1961 Convention that retail shops selling *bhang*, an infusion normatively of cannabis leaves, are licensed in a number of Indian states by the state government,<sup>34</sup> although the treaty definition appears to be applied quite loosely.<sup>35</sup>

### **2.3 Collective neutralisation of aspects of existing treaties by adoption of a new treaty**

When treaties conflict, a traditional rule in international law has been that the more recent treaty takes precedence. Thus, one option for a group of nations would be to effectively neutralise provisions of an existing treaty which they disfavoured by adopting a new treaty in the same area.

As often in international law, things are not quite that simple. Parties to the new treaty who had not withdrawn from the older one would still be bound by the obligations of the older treaty in their relations with states that were party to the old treaty but not the new one. Beyond this, there are some further complications which are not settled in international law, and which might be the subject of litigation, if such a new treaty was adopted.<sup>36</sup> Despite such caveats, this would be a worthwhile strategy for a group of like-minded states to pursue. Given the complication that the old treaty would still apply with Parties outside the new treaty, a new drug treaty would be easier to apply and perhaps more readily accepted if it retained the provisions of the present treaties on international trade in controlled drugs. Thus the draft *Framework Convention on Cannabis Control*, which has been put forward by a group of scholars as a model for a new treaty on cannabis, keeps in place the international trade provisions of the present drug treaties, while laying out a set of provisions for domestic markets in cannabis modelled on the WHO *Framework Convention on Tobacco Control*.<sup>37</sup>

A path towards the options described in Chapter 5 below might be for a group of states to agree among themselves on a new treaty with the provisions from the current treaties altered as specified in one of these Options. Given the difficulties along the path of a simple amendment process noted in 2.2 above, a new treaty among like-minded states

<sup>33</sup> Potter, D.J., Clark, P., Brown, M.B. 'Potency of  $\Delta^9$ -THC and other cannabinoids in England in 2005: Implications for psychoactivity and pharmacology'. *Journal of Forensic Sciences* 53(1):90–94, 2008.

<sup>34</sup> Room et al., 2010, pp. 99–100.

<sup>35</sup> E.g., Gorman, P. Bhang! Bhang! You're high! Peter Gorman Archive on web, viewed 25 December, 2011. <http://petergormanarchive.com/at/tales-from-india/bhang-bhang-youre-high.html> (accessed 8 July, 2012)

<sup>36</sup> Room et al., 2010, pp. 136–138; Pauwelyn, J., *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, pp. 52–58, 306, 409. Cambridge, etc.: Cambridge University Press, 2003.

<sup>37</sup> Room et al., 2010, pp. 159–91.

would probably be more easily implemented. With respect to the provisions concerning domestic law which conflict with the 1961, 1971 or 1988 treaty, the new treaty can be argued to take precedence under the 'last in time' principle.

An alternative path, which would be more radical in effect but might be more easily accepted, would be to start again, and to propose a new Single Convention covering all psychoactive substances, including those not now controlled under the drug treaties. This option is further discussed in Chapter 4 below.

### 3. ACTIONS WHICH CAN BE TAKEN INDIVIDUALLY BY ANY PARTY, OR BY PARTIES ACTING IN PARALLEL

There are a number of actions which can be taken unilaterally by States which are Parties to the treaties. These individual actions could also be co-ordinated between like-minded Parties. The latter might have advantages both in terms of the signal which the action conveys, and in terms of diminishing the effects of any opprobrium or countermeasures from other states that the actions may attract.<sup>38</sup>

#### 3.1 Denunciation of one or more of the treaties

After a period of notice, a country can denounce (withdraw from) any of the conventions. For the 1961 and 1971 treaties, the withdrawal takes effect on the next January 1 which is at least 6 months after the denunciation is received by the UN Secretary-General (Arts. 46 and 19, respectively).<sup>39</sup> For the 1988 treaty, it takes effect one year after the Secretary-General receives the denunciation (Art. 30). On 29 June 2011, Bolivia denounced the 1961 Convention, acting then so that the denunciation would take effect at the beginning of 2012. This action was taken after it had become clear that its effort to change the 1961 treaty's provisions on coca leaves would not succeed. Bolivia

<sup>38</sup> Bewley-Taylor, D. Toward revision of the UN drug control conventions: the logic and dilemmas of like-minded groups. London: International Drug Policy Consortium, *Series on Legislative Reform of Drug Policies* No. 19, March 2012. <http://www.tni.org/sites/www.tni.org/files/download/dlr19.pdf> (accessed 2 July, 2012).

<sup>39</sup> It is not clear what the effect of a denunciation of the 1961 treaty would have on status as a Party to the 1972 Protocol. In other such situations, it appears to be assumed that denouncing the treaty also denounces the protocol [e.g., Official Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, p. 1110, ¶ 3846: "A State Party to the Conventions and to the Protocol may denounce the Protocol without denouncing the Conventions; the converse is not possible". <http://www.icrc.org/ihl.nsf/COM/470-750126>, accessed 8 July, 2012]. But if there is a reaccession, the Protocol provides (Art. 19 §a) that any state acceding to the 1961 treaty after August 1975, when the Protocol entered in force, will "be considered as a Party to the Single Convention as amended". In this case, presumably the 1961 treaty's provisions on reservations would apply also to the amendments resulting from the 1972 Protocol, so that reservations could be made on any part of the treaty (but with scope for objections to the reservation for specified articles). Concerning reservations, see section 3.2 below.

has announced its intention to reaccede, providing that its reservation allowing the traditional use of coca leaves is accepted.<sup>40</sup> This procedure of denunciation and reaccession with a reservation is further discussed below. Bolivia's action in denouncing one of the three current drug treaties is unprecedented. However, there is precedent for what amounts to collective denunciation of earlier drug treaties: the 1961 treaty includes an article (Art. 44) by which that treaty, when it came into force, 'terminated' nine previous conventions, agreements and protocols.

Even though Bolivia had clearly signalled its intention to reaccede, there was strong disapproval expressed by organs of the international drug regime. The International Narcotics Control Board issued a press release stating that it 'regrets' the Bolivian decision. While acknowledging that the decision 'may be in line with the letter of the Convention', the Board 'is of the opinion [that] such action is contrary to the Convention's spirit'. The statement also implied that the decision constituted a 'threat to the international drug control system'.<sup>41</sup>

### 3.2 Reservations to a treaty

Traditionally, reservations to a treaty were to be made only at the point of accession to a treaty. However, Helfer<sup>42</sup> notes that 'late reservations have become a regular, if infrequent, component of modern treaty practice',<sup>43</sup> though their status in international law is still uncertain. The International Law Commission has recommended allowing such late reservations, but only if no other Party objects within 12 months.<sup>44</sup> But this remains a recommendation rather than a settled matter in international law. In any case, an action which can be nullified by any other party does not seem a promising path in the context of the drug treaties.

<sup>40</sup> Room, R. 'Reform by subtraction: The path of denunciation of international drug treaties and reaccession with reservations'. *International Journal of Drug Policy* 23(5):401–406, 2012.

<sup>41</sup> INCB, International Narcotics Control Board regrets Bolivia's denunciation of the Single Convention on Narcotic Drugs. Press release, UN Information Service, Vienna, 5 July 2011. <http://www.unis.unvienna.org/unis/pressrels/2011/unisnar1114.html> (accessed 24 August, 2011).

<sup>42</sup> Helfer, L.R., 'Not fully committed? Reservations, risk and treaty design'. *Yale Journal of International Law* 31:367–382, 2006. [http://www.yale.edu/yjil/PDFs/vol\\_31/Helfer.pdf](http://www.yale.edu/yjil/PDFs/vol_31/Helfer.pdf) (accessed 2 July, 2012).

<sup>43</sup> It appears that the United Kingdom made a post-ratification reservation to the 1988 drug treaty, which has been accepted without apparent objection. In a series of notifications to the UN Secretary-General between December 1993 and 2002, the UK made particular reservations to the treaty for the Isle of Man, six Caribbean territories, and Jersey and Guernsey. These notifications were all well after the UK had ratified the treaty on 28 June, 1991. See footnote 9 of [http://treaties.un.org/pp./ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&lang=en](http://treaties.un.org/pp./ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en) (accessed 2 July, 2012).

<sup>44</sup> International Law Commission, Reservations to treaties, pp. 177–180 in: Report on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), UN General Assembly Official Records A/56/10. <http://untreaty.un.org/ilc/reports/2001/2001report.htm> (accessed 2 July, 2012).



The alternative is for a Party to denounce a treaty and then reaccede with reservations. This is a settled procedure which has been used in recent years concerning other treaties.<sup>45</sup> It thus avoids procedural objections, although not, as we shall discuss, the possibility of objections to the reservation itself. As noted, it is the path Bolivia has announced it is taking with respect to coca leaves in the 1961 treaty.

The 1961 treaty, the 1972 Protocol amending it, and the 1971 treaty all have provisions concerning reservations (Arts. 49–50, 21 and 32, respectively). Reservations to the 1988 treaty, which has no such Article, are governed by the 1969 Vienna Convention on the Law of Treaties, which entered into force in 1980.<sup>46</sup> For the 1988 treaty, therefore, the only limit on a reservation filed at the time of accession is that the reservation may not be ‘incompatible with the object and purpose of the treaty’ (Art. 19(c) of the 1969 Vienna Convention). There is no provision for other parties to object to the reservation. The 1988 treaty also contains a specific provision, Art. 32 §4, which allows Parties to declare at the time of accession that they do not accept the other provisions of that Article, which subjects disputes to the jurisdiction of the International Court of Justice.

For the 1961 and 1971 treaties, the provisions concerning reservation specify some articles and sections for which reservations are permitted without being subject to any objection. The 1972 Protocol reverses the specification, listing articles and sections for which no objection is allowed. The 1961 and 1971 treaties (but not the Protocol) provide for other reservations to be made, using almost the same language (Art. 50, §3 and Art. 32, §3 respectively). A reservation is permitted unless objection is made by one-third of the Parties ‘that have signed without reservation of ratification’ (1961) or ‘that have ratified or acceded to this Convention’ (1971). No reservation to the drug control treaties has ever been turned back under these provisions.

The reservations concerning the treaties which are currently in effect are summarised in Tables 1–3, in terms of the treaty article affected and its main topic. Although the tables somewhat undercount the reservations by combining articles, they give a picture of the extensive scope and range of reservations to the treaties – 45 current reservations to articles in the 1961 treaty or its 1972 protocol, 44 to the 1971 treaty, and 73 to the 1988 treaty. (We have excluded from each table reservations which were later withdrawn, and statements such as those concerning the legal status of other parties or territories.)

Most of the reservations which have been made to the 1961 and 1971 treaties are within the bounds spelled out in the previous paragraphs and hence do not raise the possibility of objection.<sup>47</sup> However, there are clearly some reservations which could have been

<sup>45</sup> Room et al., 2010, p. 133.

<sup>46</sup> [http://untreaty.un.org/ilc/texts/1\\_1.htm](http://untreaty.un.org/ilc/texts/1_1.htm) (accessed 2 July, 2012).

<sup>47</sup> The detailed accounting of reservations to each of the treaties can be found at: [http://treaties.un.org/pp/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-15&chapter=6&lang=en](http://treaties.un.org/pp/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-15&chapter=6&lang=en) and four other sites differing only in substituting 16, 17, 18 and 19 for the “15” in this web address. (accessed 2 July, 2012)



objected to. Concerning the 1971 treaty, Germany made a reservation concerning Art. 11 §§2 and 4 on the details of record-keeping requirements for pharmaceutical manufacturers; Papua New Guinea made a reservation to Art. 10 §1 about warnings on medication packages; and Canada made a reservation to Art. 32 §4 about substances used in 'magical or religious rites' that goes beyond the permitted scope of reservations, which specified 'except for the provisions relating to international trade'.<sup>48</sup> The UN database does not record any objection to these reservations. For the 1971 treaty, but not for the other treaties, the database does record, in a footnote to most of the reservations which could have been objected to, that the reservation was 'deemed to have been permitted' in the absence of objections within one year from other parties.

<sup>48</sup> Canada's reservation notes that "said substances occur in plants which grow in North America but not in Canada", implying they are a matter of international trade.

*Table 1. Summary of reservations to the 1961 Treaty and its 1972 Protocol<sup>49</sup>*

Reservation	Article	Country
Summary of reservations to the 1961 Treaty		
Transitional concerning traditional usage; expired except for claimed status of Nepal	49	Bangladesh, India, Myanmar, Pakistan, Nepal
INCB authority over estimates and compliance	12(2, 3); 13(2); 14(1,2); 31(1b)	Belarus, Bulgaria, Hungary, Poland, Romania, Russia, Ukraine
Jurisdiction of International Court of Justice over disputes under the treaty	48	Algeria, Andorra, Bahrain, Argentina, China, Indonesia, Papua New Guinea, Saudi Arabia, South Africa, Vietnam
Penal provisions interpreted as satisfied by administrative regulations	36	Austria
Existing wholesale administration kept rather than set up a new one	17	Sri Lanka
Summary of reservations to the 1972 Protocol		
INCB powers: estimate system	5 amending 12(5)	Belgium, India, Mexico, Peru
Tighter provisions on estimates	9 amending 29(1, 2, 5)	Belgium, India, Montenegro, Serbia
INCB powers: referral to ECOSOC	6 amending 14(1, 2)	India, Mexico, Myanmar, Romania
INCB powers on opium limits	11 adding 21 <i>bis</i>	India, Mexico, Montenegro, Serbia
Extradition	14 amending 36	Brazil, Canada, Cuba, India, Myanmar, Panama, Vietnam
Stiffer control of Schedule III preparations	1 amending 2(4)	Brazil, Greece

<sup>49</sup> See [http://treaties.un.org/pp/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-15&chapter=6&lang=en](http://treaties.un.org/pp/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-15&chapter=6&lang=en); and same web address but substituting 17 and 18 for 15.

*Table 2. Summary of reservations to the 1971 Treaty<sup>50</sup>*

<b>Reservation</b>	<b>Article</b>	<b>Country</b>
Reservation for plants traditionally used in 'magical or religious rites'	32(4); 7	Canada, Mexico, Peru, USA
INCB powers	19	Belarus, Brazil, Egypt, Hungary, Iraq, Myanmar, Peru, Poland, Russian Federation, South Africa, Ukraine
Jurisdiction of the International Court of Justice	31	Afghanistan, Andorra, Bahrain, Belarus, Brazil, China, Cuba, Egypt, France, Hungary, India, Indonesia, Iran, Iraq, Libya, Myanmar, Papua New Guinea, Russian Federation, South Africa, Tunisia, Turkey, Ukraine, Vietnam
Keep existing invoice system	11(2, 4)	Germany
Extradition	22(2b)	Myanmar, Vietnam
Warnings on packages and control of advertisements	10(1)	Papua New Guinea
Penal provisions interpreted as satisfied by administrative regulations	22	Austria
Will 'abide by its provisions albeit having permissible reservations' under the treaty		Bangladesh

<sup>50</sup> See [http://treaties.un.org/pp/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-16&chapter=6&lang=en](http://treaties.un.org/pp/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6&lang=en)

*Table 3. Summary of reservations to the 1988 Treaty<sup>51</sup>*

<b>Reservation</b>	<b>Article</b>	<b>Country</b>
Criminalisation of possession, purchase, cultivation (varied statements and reservations, Bolivia and Colombia concerning coca leaf)	3(2)	Austria, Bolivia, Colombia, Germany, Netherlands, Switzerland
Criminalisation of production and means of production	3(1)	Austria, Colombia, Peru
Definition of illicit traffic	1	Netherlands, Peru
Serious crimes and long statute of limitations	3(6, 7, 8)	Colombia, Netherlands, Switzerland
Confiscation	5	Austria, Colombia, Panama, San Marino
Bank secrecy	5(3), 7(2f, 5)	Lebanon
Jurisdiction of International Court of Justice	32	Algeria, Andorra, Bahrain, Brunei, China, Cuba, France, Indonesia, Iran, Israel, Kuwait, Lao PDR, Lebanon, Lithuania, Malaysia, Myanmar, Peru, Saudi Arabia, Singapore, South Africa, Thailand, Turkey, U.S.A., Vietnam
Extradition	6	Colombia, Iran, Lithuania, Myanmar, Singapore, U.S.A, Venezuela, Vietnam
Extradition – definition of a political offence	3(10)	Sweden
Mutual legal assistance	7	Austria, Colombia, U.K., U.S.A.
Extraterritorial jurisdiction	8	Belize, Colombia
Cooperation across judicial systems	9(1)	Colombia, San Marino
Domestic legal system subject to change	2(1)	Austria
Burden of proof	5(7)	Colombia
Controlled delivery	11	Austria, Colombia, San Marino, Venezuela
Intercepting sea traffic	17	Brazil, Colombia, Denmark, Netherlands, Tanzania
‘Reserves the right to enter reservations in respect to such articles as it may see fit at a time subsequent to this signature’		Yemen
Reservation for any required ‘legislation or other action by the U.S.A. prohibited by the Constitution of the U.S.’		U.S.A.

<sup>51</sup> See [http://treaties.un.org/pp/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&lang=en](http://treaties.un.org/pp/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en).

Reservations about traditional use of plant products in the 1961 and 1971 treaties were made by a number of countries upon acceding. The 1961 treaty only allowed such reservations to be 'transitional', for a period of 15 years (for quasi-medical use of opium) and 25 years (for cannabis and coca leaf chewing) from the treaty's entry into force on 13 December, 1964. Nepal, however, made a reservation upon acceding in 1987 to the 1961 Convention (as amended) which included a 'right to permit temporarily' the production and use of opium and cannabis without any end-date specified. This reservation did not attract any objections, in spite of being made after the expiration of the transitional period for opium.

Many of the other reservations made to the 1961 and 1971 treaties and the 1972 Protocol (within the limits allowed without scope for objection) concerned general matters of disagreement in international law. These included: the extradition of nationals; the jurisdiction of the International Court of Justice; what entities qualified as states to be signatories; and the powers of the International Narcotics Control Board. There are thus quite substantial exceptions to the general provisions of the treaties which have been made as reservations by one or more Parties.

In acceding in 1997 to the 1961 treaty as amended by the 1972 Protocol, Vietnam made a reservation concerning Art. 36 §2(b), with respect to extradition. This is a provision on which objections are permitted, and is the single instance in which objections to a 1961 treaty reservation were filed, by Austria, Sweden and the U.K. Austria raised the stakes by expressing 'doubts as to [the reservation's] compatibility with the object and purpose of the Convention', invoking language used in the Vienna Convention on the Law of Treaties as the condition under which a reservation would be impermissible. But the objections were from a small proportion of the Parties, and no further action is recorded.

Reservations to the 1988 treaty, for which there is no provision for blocking objections, are numerous. A total of 23 parties, including the U.S.A., made statements or reservations renouncing or limiting the jurisdiction of the International Court of Justice over disputes about the treaty. Colombia, Iran, Lithuania, Myanmar, Singapore, the U.S.A., Venezuela and Vietnam made reservations concerning extradition (Art. 6), and Sweden made a reservation concerning Art. 3 §10 with respect to extradition. Austria, Colombia, Panama and San Marino made reservations concerning confiscation and seizure (Art. 5), with Colombia and San Marino also reserving on other forms of cooperation (Art. 9), and Austria, Colombia, San Marino and Venezuela on cooperating on controlled delivery (Art. 11). The U.K. made a reservation on immunity from arrest of witnesses or experts at a legal proceeding requested by another Party (Art. 7 §18).

Various reservations were made concerning Article 3, the article on offences and sanctions. Bolivia made an eloquent reservation with respect to coca leaf on the section requiring possession or purchase for personal consumption to be a criminal offence (§2), and Colombia also made specific comment on the 'discriminatory, inequitable and restrictive' treatment of coca leaf in the treaty in the course of a series of Declarations about how it would interpret various treaty provisions. Peru's reservation focused on the prohibition of cultivation and definition of 'illicit traffic' in Article 1. Switzerland

made a reservation concerning criminalising possession or purchase for personal consumption (§2), as well as on provisions urging that offences under the article be regarded as serious, and be treated with limits on discretion and with long statutes of limitations (§§6,7,8). The Netherlands also reserved concerning §§6, 7 and 8, and declared a number of ‘understandings’ upon signing the treaty concerning Article 3 and the definition of ‘illicit traffic’ in Article 1.

Yemen’s reservation is open-ended, reserving its ‘right to enter reservations in respect to such articles as it may see fit at a time subsequent to this signature’.

Seventeen parties, including European Union members, Mexico, Turkey and the United States, filed objections to the reservations to the 1988 treaty. The objections concerned matters of extradition, confiscation, mutual assistance, and the law of the sea. Only the U.S. objection to Colombia’s reservations and declarations makes reference to a reservation concerning Article 3. The objections do not block any of the reservations, since the 1988 treaty has no specific provision which allows that. However, several of the objections considered the reservation in question ‘to be contrary to the object and purpose of the Convention’ – as France stated, for instance, concerning Lebanon’s reservations concerning banking secrecy, and Vietnam’s concerning extradition.

As noted, France’s language here points to possible challenges of future reservations under the 1969 Vienna Convention on the Law of Treaties. But what is meant by the ‘object and purpose’ of a treaty, as a leading treatise on international law notes drily, ‘is not free from uncertainty’.<sup>52</sup> A footnote to this statement quotes two guidelines to practice, in draft then but now adopted by the International Law Commission, which do not do much to give a more specific meaning:

### 3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d’être* of the treaty.

#### 3.1.5.1 Determination of the object and purpose of the treaty

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.<sup>53</sup>

<sup>52</sup> Shaw, M.N. *International Law*, 6<sup>th</sup> edition. 1<sup>st</sup> South Asian edition, p. 921. Cambridge, etc.: Cambridge University Press, 2010.

<sup>53</sup> International Law Commission. *Guide to Practice on Reservations to Treaties*, 2011. New York: United Nations, 2011. [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1\\_8\\_2011.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_8_2011.pdf) (accessed 7 April, 2012).

As Swaine notes, ‘the Vienna Convention [on the Law of Treaties] sheds no light on how a treaty’s “object and purpose” is to be reckoned, nor does practice’.<sup>54</sup> Though some objections to reservations to the drug treaties have used the ‘object and purpose’ formulation, no further argument is made indicating views on what the phrase might more specifically mean in a drug treaty context.

The precedents in the drug treaties, in summary, are that there are multiple reservations by many parties to the treaties. Parties making reservations include the U.S., the Russian Federation, and other countries viewed as strong supporters of the drug prohibition system. It thus seems disingenuous of the INCB, with respect to Bolivia’s action in 2011, to criticise ‘any approach whereby Governments use the mechanism of denunciation and re-accession with reservation, in order to free themselves from the obligation to implement certain treaty provisions’.<sup>55</sup>

### **3.3 Denunciation followed by reaccession with reservations**

As already noted, withdrawing from a treaty and then immediately rejoining with specified reservations is a strategy with a number of modern precedents from other treaties.<sup>56</sup> As mentioned, Bolivia has now set out down this path, denouncing the 1961 treaty while announcing an intention to reaccede with a reservation concerning coca leaves. Though the path probably seems more extreme to an untutored observer (considering the melodramatic connotations of ‘denounce’ in ordinary usage), it is a path which is less problematic under international law than the apparently simpler path of a late (retrospective) reservation (see 3.2 above). As noted, even the INCB, in its press release deploring Bolivia’s action, acknowledged it to be ‘in line with the letter of the Convention’.

The essential nature of a reservation is that it subtracts from the treaty or specifies it, but does not add new provisions or language. Thus it inherently has a more limited scope than making amendments to a treaty, which usually involve adding new language. Nevertheless, reservations can be used to accomplish the two main goals with which we are concerned, and in the next chapter we set forth how this could be accomplished.

In the previous section, we spelled out the provisions in the drug treaties concerning objections to reservations, and the conditions under which objections can mean that a reservation is rejected. Reservations discussed in Chapter 6 entail proposed alterations to the 1961 (as amended) and 1971 treaties with respect to provisions in the treaty where

<sup>54</sup> Swaine, E.T. ‘Reserving’. *Yale Journal of International Law* 2:307–66, 2006.

<sup>55</sup> TNI with Reuters and Associated Press, ‘Evo does not convince the INCB on coca chewing’. Dec. 16. Amsterdam: TransNational Institute, 2011. <http://druglawreform.info/en/newsroom/latest-news/item/3049-evo-does-not-convince-the-incb-on-coca-chewing> (accessed 2 July, 2012).

<sup>56</sup> Helfer, L.R. ‘Not fully committed? Reservations, risk and treaty design’. *Yale Journal of International Law*, 31: 367–82, 2006.

objections can be lodged and can lead to rejection of the reservation. In contrast, a reservation to the 1988 treaty could not be rejected because of objections by Parties.

A country, acting either alone or in parallel with other parties, could thus implement a version of the suggestions in the next chapter in conformity with international law by denouncing the treaties and reaccessing with reservations along the lines we have suggested. Reservations filed on reaccession to the 1988 treaty would have to be accepted, despite any objections which might be filed.<sup>57</sup> Reservations to the 1961 (as amended) and 1971 treaties could be rejected by objections from a blocking one-third of Parties.

Helfer notes that objections to reservations are actually relatively rare in international law.<sup>58</sup> But given the active opposition with which the U.S. and other Parties have responded to the Bolivian attempt to amend the 1961 Convention (see section 2.1 above), a country taking this path would have to be prepared for the possible rejection of its reservations to the 1961 and 1971 treaties.

What happens if the number of objections were to be sufficient to block a reservation is in dispute. Goodman lays out three alternative dispositions which have been argued for: (1) the reserving state may then be bound except for the positions which it reserved against (in which case the objections would have had no practical effect); (2) the state may just not be a party to the treaty; or (3) the state may be considered a party without being able to apply the reservation.<sup>59</sup> Since accessions to treaties commonly take effect after 30 days, while objections to reservations may commonly be made for up to 12 months,<sup>60</sup> the situation might well become not only ambiguous but also quite confused. To avoid such ambiguity, Bolivia made its reaccession contingent on acceptance of its reservation. So if the reservation is not accepted, Bolivia remains outside the 1961 treaty.

Such a result would be contrary to a main goal of the international drug control system, the one goal on which it can be seen by all unambiguously to have succeeded. The system has prided itself on attaining near-universality in accession to the treaties; the INCB annual reports each include a section on the current status in this regard. Though those staffing and committed to the system in its present form might be extremely

<sup>57</sup> The one path which could in theory disallow a reservation would be a lawsuit asking the International Court of Justice to rule the reservation “contrary to the object and purpose of the Convention”. This could not be filed by any of the many parties, including the U.S. for the 1988 Convention (see Table 3), which filed a reservation rejecting the jurisdiction of the ICJ over the particular treaty.

<sup>58</sup> Helfer, 2006.

<sup>59</sup> Goodman, R. ‘Human rights treaties, invalid reservations, and state consent’. *American Journal of International Law* 96:531–60, 2002.

<sup>60</sup> Pellet, A. *Fourteenth report on reservations to treaties*. International Law Commission, 61st session. New York: United Nations, General Assembly, 2009, pp. 25–28, document A/CN.4/614/Add.2 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/450/18/PDF/N0945018.pdf?OpenElement> (accessed 7 April, 2012).



unhappy about a country implementing a change in their situation in this manner, to deny reaccession would be a dramatic retreat from the goal of universality that it is doubtful the international system would want to take.

The main disincentive to a country taking this path arises less from a threat of exclusion than from pressures and countermeasures outside the drug control system (e.g. economic sanctions) that could be threatened by the U.S. and other main supporters of the system. As an example of such pressures, in response to Bolivia's actions, on 19 March, 2012, the European Commission decided to 'initiate an investigation in order to establish whether the denunciation of the UN Single Convention on Narcotic Drugs justifies a temporary withdrawal of the special incentive arrangement for sustainable development and good governance for products originating in Bolivia'.<sup>61</sup> There would be more safety in numbers against these pressures and threatened countermeasures, which makes a coordinated series of denunciations and reaccessions a path worth considering for like-minded countries wishing to implement either of the Options discussed in Chapter 6.

### 3.4 Passing countermanding national legislation

A path which is theoretically open to some countries, but not to others, is to nullify an international commitment with a new national law. States in which international treaties are constitutionally 'on the same footing as national legislation' may pass laws which supersede treaty obligations under the 'last in time' rule.<sup>62</sup> In the U.S., for instance, national legislation can thus nullify a commitment in international law.<sup>63</sup> Depending on the constitutional and legal situation, this is also possible in some other countries.<sup>64</sup> 'It is by no means settled as a general principle whether treaties prevail over domestic rules', a leading textbook notes after a 20-page review of the situation in a number of countries.<sup>65</sup> Such an approach would, however, be a direct challenge to international normative expectations, and countries taking this path could expect considerable international opprobrium and pressure.

<sup>61</sup> European Commission. Commission implementing decision of 19 March 2012 (2012/161/EU). *Official Journal of the European Union* 20.3.2012. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:080:0030:0030:EN:PDF> (accessed 28 March, 2012).

<sup>62</sup> Cassese, A. *International Law*, 2nd ed., p. 222. Oxford, etc.: Oxford University Press, 2005.

<sup>63</sup> Ku, J. 'Treaties as laws: a defense of the last in time rule for treaties and federal statutes'. *Indiana Law Journal*, 80: 319–91, 2005; Bianchi, A. 'International law and US courts: the myth of Lohengrin revisited'. *European Journal of International Law* 15(4):751–81, 2004.

<sup>64</sup> Conforti, B. *International Law and the Role of Domestic Legal Systems*. Leiden: Martinus Nijhoff, 1993.

<sup>65</sup> Shaw, M.N. *International Law*, 6th edition. 1st South Asian edition, p. 178. Cambridge, etc.: Cambridge University Press, 2010.

#### 4. CONCLUSIONS

There are thus a number of paths by which the changes considered in this book could in principle be implemented. Of those mentioned, four stand out as the most viable paths.

**Denunciation and reaccession with reservations.** As discussed in 3.2 above, under the surface of the apparent universality of the drug control treaties is a substantial spaghetti of existing reservations on the treaties, on a variety of grounds and from a diversity of parties. The reservations have been filed on accession to the treaties. The clearest way forward under international law for a country which is already Party to the treaties that wishes to change its domestic arrangements for drugs covered by the treaties is to denounce (withdraw from) one or more of the treaties, announcing that it will reaccede as soon as it can with new reservations. The path of new reservations is further considered in Chapter 6 below.

Legally, this is a straightforward path, as Bolivia has demonstrated. But a single country taking this path is likely to come under some pressure from defenders of the system as it currently is. The pressure might well be easier to withstand if a number of countries announced parallel actions.

**Preemption by a 'last in time' domestic law.** For some countries, there is an option to nullify provisions of international treaties simply by passing countermanding domestic law. If the constitutional settlement in the country assigns equal priority to international and national law, and resolves conflicts between laws under the 'last in time' legal rule, then a newly passed domestic law will supersede any prior international legal provision that it directly contradicts. While such a constitutional provision conflicts with the expectations of international law, there is no mechanism for these expectations to be enforced. Somewhat ironically in the present context, it is the U.S. that is the leading and most discussed example of this constitutional situation. A single country taking this path, however, is likely to come under considerable international pressure.

**Preemption by 'last in time' international treaties derived from the current treaties.** A group of like-minded countries could adopt a new treaty or treaties which were composed, for instance, by simply applying the changes specified in Chapter 5 to the current treaties. The group could simply be called together by a single nation or group of nations, or the treaties could be negotiated under the auspices of a multinational organisation, such as a regional organisation. One alternative would be for prospective Parties to denounce the present treaties as the new ones took effect. Another would be for Parties to the new treaties to simply continue to be party to the old treaties. Then the new treaties, more recently concluded, would preempt the existing treaties on matters where they conflict, notably concerning domestic laws and markets. Since the new treaties would have provisions on control of international trade in harmony with those in the current 1961 (as amended), 1971 and 1988 treaties, the two sets of treaties could operate in harmony in that respect, but with substantial differences between them in the handling of domestic laws and markets.

**Preemption by a new ‘single convention’.** This option is discussed in Chapter 4. As with (c) above, there are two alternative paths here: either denunciations of the existing treaties and replacement by the new one, or continued adherence to the existing treaties, but their preemption where there is conflict by a new treaty.

This volume primarily addresses two main constraints in present international drug conventions on national choices concerning drug control laws. The conventions do not clearly allow parties to permit the possession of psychoactive substances included in their schedules for non-medical personal use, or other acts undertaken only for the purpose of non-medical personal use of the substances (including cultivation, production, manufacture, supply or acquisition). And they do not allow the creation of a regulatory regime for the production and sale of the substances in the domestic market. We tackle the issue of changes which would accomplish these ends in two ways. In Chapter 5 we suggest positive change in the language of the treaties which would accomplish the aims. The rationales for the changes proposed in Chapter 5 are further discussed in Part II of this volume. Presuming that the system as a whole is not willing to make such changes, the changes could be adopted by a group of countries as a new treaty intended to prevail as ‘last in time’ in case of conflict with the old treaties. In Chapter 6 the issue is tackled by subtraction, that is, in terms of reservations which accomplish the aims which could be adopted by a country or a group of countries denouncing the treaties and then reaccessing.

We also offer a further option for consideration in Chapter 7. The 1971 and 1961 conventions differ substantially in the extent of international oversight which is specified for the international production of controlled substances for medical and scientific uses. This difference primarily arose because the 1971 convention potentially broadly affected the interests of the global pharmaceutical industry, headquartered in influential high-income countries,<sup>66</sup> while the substances covered by the 1961 convention, at the time of its adoption, were primarily produced in low-income and less influential areas of the world. As a whole, the substances covered under the 1961 convention are not inherently more harmful than the substances covered under the 1971 convention, and there is no clear logic for a detailed international market control system to exist for one set but not the other. So we also provide an option in which the international supervision of the market for the drugs covered by the 1961 convention is made equivalent to those for drugs covered by the most stringent provisions of the 1971 convention.

<sup>66</sup> McAllister, W. ‘Conflicts of interest in the international drug control system’, in: Walker, W., ed., *Drug Control Policy: Essays in Historical and Comparative Perspective*, pp. 143–66. University Park, PA: Pennsylvania State University Press, 1992.

## Chapter 4. Towards a new 'Single Convention'

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### 1. THE ARGUMENT FOR A NEW COMPREHENSIVE CONVENTION

IT IS BY NOW a commonplace that the greatest harm to global health from psychoactive substances comes from two substances, tobacco and alcohol, which are not included in the international drug conventions.<sup>67</sup> Even comparing substances on the basis of the range of harms associated with heavy use of the most harmful form of the substance, alcohol and tobacco are among the most harmful,<sup>68</sup> And a recent expert ranking, taking into account harm to others, put alcohol first on the list.<sup>69</sup> Yet there is no current international treaty on alcohol. There is a *Framework Convention on Tobacco Control* (FCTC),<sup>70</sup> but it has few mandatory provisions with respect to international trade or domestic markets, and none that require criminalisation of use.<sup>71</sup>

The present drug conventions were the product of a specific historic era, in which drugs under international control were viewed as entirely distinct from and much more harmful than tobacco and alcohol<sup>72</sup> – a position which experts in the field did not support in 1910, and do not today.<sup>73</sup> In the current state of psychopharmacological and epidemiological knowledge, no scientific rationale based on harmfulness can justify the inclusion of some drugs which are under international control while excluding alcohol and tobacco. The last attempt by a committee of pharmacologists to do this was in 1957,

<sup>67</sup> Lim, S.S., Vos, T., Flaxman, A.D., Danae, G., Shibuya, K et al., 'The burden of disease and injury attributable to 67 risk factors and risk factor clusters in 21 regions 1990–2010: a systematic analysis', *Lancet* 380;2224–2260, 2012.

<sup>68</sup> Hall, W.D., Room, R. & Bondy, S. 'Comparing the health and psychological risks of alcohol, cannabis, nicotine and opiate use'. In Kalant, H., Corrigal, W., Hall, W.D. & Smart, R. (eds.), *The Health Effects of Cannabis*, pp. 475–506. Toronto: Centre for Addiction and Mental Health, 1999.

<sup>69</sup> Nutt, D., King, L.A., Phillips, L.D. et al. 'Drug harms in the UK: A multicriteria decision analysis'. *The Lancet* 376 (9752):1558–65, 2010.

<sup>70</sup> WHO *Framework Convention on Tobacco Control*. Geneva: WHO, 2003, updated 2005. [http://www.who.int/fctc/text\\_download/en/index.html](http://www.who.int/fctc/text_download/en/index.html) (accessed 8 July, 2012).

<sup>71</sup> Room, R. 'International control of alcohol: alternative paths forward'. *Drug and Alcohol Review* 25:581–95, 2006.

<sup>72</sup> Courtwright, David T., 'Mr. ATOD's wild ride: What do alcohol, tobacco, and other drugs have in common?' *Social History of Alcohol & Drugs* 20: 105–40, 2005. [http://digitalcommons.unf.edu/ahis\\_facpub/1](http://digitalcommons.unf.edu/ahis_facpub/1) (accessed 2 July, 2012).

<sup>73</sup> Babor, T., Caulkins, J., Edwards, G., Fischer, B., Foxcroft, D., Humphreys, K., Obot, I., Rehm, J., Reuter, P., Room, R., Rossow, I. & Strang, J. *Drug Policy and the Public Good*, pp. 217–18. Oxford, etc.: Oxford University Press, 2010.

and their effort was rejected by a successor committee in 1964.<sup>74</sup> In the current intellectual ferment on the relative dangerousness of drugs,<sup>75</sup> no-one argues that the present arrangements are justified on the grounds of relative addictiveness and impact on public health.

So it is time for a new Single Convention which pulls together into a single international control regime the major psychoactive substances. Such a Convention would, on the one hand, strengthen the rather weak provisions of the *Framework Convention* on tobacco, and institute an international control regime on alcohol, while on the other hand eliminating the overreaching provisions of the current international drug control treaties.

## 2. THE ISSUE OF AUSPICES<sup>76</sup>

New treaties are usually negotiated by a Conference of Parties assembled for that specific purpose. There is no necessity in international law for the negotiations to be hosted by any particular entity. It was in response to a US invitation, for instance, that conferences were convened and the original Hague Opium Convention was negotiated. Given the controversy which would be likely to surround the effort to negotiate a new Single Convention, the simplest path forward might well be to proceed with a negotiating conference convened by this older path of invitation from one or more interested nations.

However, in recent years it has been common practice to negotiate such agreements under the auspices of an intergovernmental agency. In the United Nations system, the international drug conventions are under the auspices of the Commission on Narcotic Drugs, which reports to the UN Economic and Social Council (ECOSOC). An obvious alternative would be to take the precedent of the FCTC, which was negotiated at the call of the World Health Assembly and under the auspices of the World Health Organisation.<sup>77</sup> There is a strong case for putting public health at the heart of the new convention, and this would argue for WHO auspices. Another international convention which involves psychoactive substances, the *International Convention against Doping in Sport 2005*,<sup>78</sup> was negotiated under the auspices of the United Nations Education,

<sup>74</sup> Room, R. Alcohol and drug disorders in the International Classification of Diseases: a shifting kaleidoscope, *Drug and Alcohol Review* 17:305–17, 1998.

<sup>75</sup> E.g., Caulkins, J.P., Reuter, P., Coulson, C. 'Basing drug scheduling decisions on scientific ranking of harmfulness: false promise from false premises; with comments and a response', *Addiction* 106(11):1886–98, 2011.

<sup>76</sup> This section draws on pp. 140–1 in: Room, R., Fischer, B., Hall, W., Lenton, S. & Reuter, P. *Cannabis Policy: Moving beyond Stalemate*. Oxford: Beckley Foundation Press and Oxford University Press, 2010, which considered potential auspices for a new *Framework Convention on Cannabis Control*.

<sup>77</sup> Room, 2006.

<sup>78</sup> [http://portal.unesco.org/en/ev.php-URL\\_ID=31037&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 2 July, 2012).

Scientific and Cultural Organisation (UNESCO), and came into effect on 1 February, 2007.

Another option would be to follow the earlier path taken in sports doping, and work under the auspices of a regional intergovernmental body. In 1989, an *Anti-Doping Convention* was negotiated under the auspices of the Council of Europe, that came into force in 1990.<sup>79</sup> As the Council's website explains,<sup>80</sup> 'the Convention is an "open" convention, which means it can be adopted by countries which are not members of the Council of Europe as well as countries outside Europe'. Australia, Canada and Tunisia have ratified it.

In the more general drug field, the Parliamentary Assembly of the Council of Europe adopted a resolution on 3 October, 2007, calling for 'a European convention promoting public health policy in the fight against drugs'.<sup>81</sup> The convention is particularly concerned with establishing a public health approach to treatment services and social handling of drug users,<sup>82</sup> although no progress has apparently been made beyond the adoption of the resolution. The Council of Europe's longstanding interest in the drugs field would make it one of the logical potential auspices for a comprehensive new drug control convention.

### 3. PRINCIPLES FOR THE SCOPE AND APPROACH

It is beyond the bounds of the present volume to suggest specific language for such a new Convention. Instead we offer for further discussion a first list of principles to be followed in arriving at the text of a new Single Convention.

- a. Countries should be encouraged to set up regulatory regimes controlling commercial production and sale of psychoactive substances. An overriding aim of these regimes should be to limit health and social harms arising from use of the substances. The form and content of the regime for a particular substance is a matter for decision at a

<sup>79</sup> Council of Europe (1989). *Anti-Doping Convention*. Strasbourg: Council of Europe. <http://conventions.coe.int/Treaty/en/Treaties/Html/135.htm> (accessed 26 December, 2011).

<sup>80</sup> Council of Europe, Doping is not playing the game. Strasbourg: Council of Europe. [http://www.coe.int/t/dc/files/themes/dop./default\\_en.asp?](http://www.coe.int/t/dc/files/themes/dop./default_en.asp?) (accessed 26 December, 2011).

<sup>81</sup> Council of Europe, Parliamentary Assembly. For a European convention promoting public health policy in the fight against drugs. Resolution 1576 (2007). Strasbourg: Council of Europe, 2007. <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1576.htm> (accessed 26 December, 2011).

<sup>82</sup> Council of Europe, Parliamentary Assembly. For a European drug convention on promoting public health policy in drug control, Doc. 11344, 10 July 2007. Report, Social, Health and Family Affairs Committee. Strasbourg: Council of Europe, 2007. <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11344.htm> (accessed 26 December, 2011).

national or subnational level. Prohibition of production and sale of the substance would be an option.

- b. Other countries should be required to show comity, that is, to respect national decisions about the domestic market for a particular psychoactive substance, including forbidding commercial export to a country where sale of the substance is prohibited, and requiring that a country's advertising or promotion restrictions on a psychoactive substance be respected by media directed across borders.
- c. An international oversight agency would have the tasks of monitoring production and trade in psychoactive substances and patterns of use on a global basis. It would also coordinate international action to minimise health and social harms from the use of psychoactive substances. It would include focusing international attention in three directions: (i) ensuring adequate supplies of psychopharmaceuticals for medical purposes, including in low-income societies; (ii) pointing to situations in which drug use, or societal reactions to drug use, are producing substantial social or health problems, and facilitating solutions to these problems; and (iii) pointing to aspects of international trade in drugs which are contrary to comity (i.e., undercut a national control regime) or exacerbate drug-related problems.
- d. Consideration should be given to whether local customary production and use of traditional plant-based psychoactive substances -- e.g., khat, coca leaves, betel, kava, cannabis leaves -- should be excluded from the scope of the convention.
- e. As in the FCTC, the treaty should include a variety of soft-law recommendations concerning the regulation of domestic markets in psychoactive substances. These could include recommendations on prescription regimes, quality and labelling controls, state licensing and monopoly regimes and enforcement mechanisms, tax regimes, restrictions on availability, and controls on advertising and promotion.
- f. The treaty should provide that national decisions on regulation of psychoactive substances on domestic markets cannot be overturned by trade agreements or trade dispute settlements -- that considerations of public health and order take precedence over trade and free market agreements. With respect to tobacco, such a provision would offer a substantial improvement on the present FCTC.

## **PART II. PROPOSALS FOR CHANGE**





## Chapter 5. Proposed treaty amendments to allow possession and use, or to allow regulated domestic markets

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### 1. TWO OPTIONS IN AMENDING THE UN DRUG CONVENTIONS

IN THIS CHAPTER we turn to proposing treaty language which would adapt the present international drug control framework to allow for national or subnational experiments in two directions. The first alternative involves proposing minimum changes to the major international drug conventions that would unambiguously allow Parties to the Conventions to permit the use and possession of drugs for other than commercial purposes. The second alternative, which includes the first, proposes more significant changes that would allow Parties to the Conventions to legalise domestic markets and international trade in drugs (between countries with legal domestic markets), and make their own decisions about how domestic markets should be regulated.

Section 2 below explains the scope of the first of these options, and section 3 spells out the actual amendments of the treaties which are proposed to put this option into effect. In parallel fashion, section 4 explains the scope of the second option, and sections 5 spells out the actual amendments to put the option into effect.

The rationales for the language proposed here are more fully discussed in the Appendix of this volume. Since Option 2 includes within it Option 1, the general discussion in the Appendix deals with both options, while maintaining a separation concerning the changes in treaty language proposed for Option 1 and for Option 2.

### 2. OPTION 1 – REMOVE OBLIGATIONS TO PROHIBIT ACTIONS RELATING TO PERSONAL USE OF DRUGS

This option would involve making changes to wording in the Conventions that would relieve Parties to the Conventions from existing obligations to prohibit (through legal or administrative measures) personal use or possession of drugs, or cultivation, production, manufacture, supply, acquisition, purchase, import or export of drugs, when these actions involved only a small quantity of drugs and were for other than commercial purposes.

The aim of these changes would be to allow Parties to elect not to prohibit personal use or possession of drugs, or other actions relating to personal use of drugs. Personal use of drugs would refer to consumption of drugs by an individual, including for non-medical purposes. These changes would allow people to use drugs themselves, supply small quantities of drugs to others for their personal use, transfer small quantities of drugs between countries for their own or others' personal use, or produce, cultivate, manufacture, purchase, acquire or possess small quantities of drugs for these purposes.

Currently under the Conventions, Parties are required to limit international and domestic markets in narcotic drugs and psychotropic substances, and not to allow possession and use of these drugs and substances except for medical and scientific purposes. Subject to certain limited exceptions, Parties must prohibit the cultivation, production, manufacture, distribution of, trade in, and possession of drugs, for other

than medical or scientific purposes. This includes prohibiting non-medical personal consumption or non-commercial supply to others for their consumption, and making these and other related actions criminal offences.

The specific provisions of the Conventions that may require Parties to prohibit actions relating to personal use or non-commercial supply of drugs, or that are otherwise inconsistent with the aims of Option 1, and that would need to be amended and/or changed in effect, are:

- for the 1961 Convention: Articles 4(c), 9(4), 23, 26, 28, 29, 30, 31, 33 and 36
- for the 1971 Convention: Articles 5, 7, 8, 9 and 22
- for the 1988 Convention: Articles 3(1) and 3(2).

### 3. SUMMARY OF PROPOSED AMENDMENTS FOR OPTION 1

#### 3.1 Proposed amendments to the 1961 Convention

##### Preamble

In the preamble, in the paragraph beginning 'Desiring':

1. for 'limiting such drugs to', substitute 'ensuring the availability of such drugs for'
2. after 'medical and scientific use,', insert 'preventing illicit traffic in such drugs,'.

PREAMBLE
The Parties
...
Desiring to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, <del>limiting such drugs to</del> <b>ensuring the availability of such drugs for</b> medical and scientific use, <b>preventing illicit traffic in such drugs</b> , and providing for continuous international co-operation and control for the achievement of such aims and objectives,
Hereby agree as follows:
...

##### Article 1 – definitions

Insert as Article 1(1)(o) *bis*:

“Non-commercial purpose” means a purpose other than to receive pecuniary benefit.’

## ARTICLE 1. DEFINITIONS

Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout the Convention:

...

o) "Medicinal opium" means opium which has undergone the processes necessary to adapt it for medicinal use.

**o) bis "Non-commercial purpose" means a purpose other than to receive pecuniary benefit.**

New Article 3 *bis* – exemption for non-commercial actions

Insert as Article 3 *bis*:

'Other than article 30(2)(b), this Convention does not apply to the cultivation, production, manufacture, extraction, preparation, offering, distribution, delivery, dispatch, transport, supply, purchase, acquisition, import, export, possession or use of drugs, or any similar or related action with respect to drugs where such action involves only a small quantity of drugs and is for a non-commercial purpose.'

## ARTICLE 3 *BIS*

**Other than article 30(2)(b), this Convention does not apply to the cultivation, production, manufacture, extraction, preparation, offering, distribution, delivery, dispatch, transport, supply, purchase, acquisition, import, export, possession or use of drugs, or any similar or related action with respect to drugs where such action involves only a small quantity of drugs and is for a non-commercial purpose.**

Article 4 – general obligations

In Article 4(c):

1. after 'medical and scientific purposes':
  - a) insert a colon
  - b) on a new line, insert '(i) trade in drugs; and'
  - c) on a new line, insert '(ii)'
2. delete 'trade in, use'
3. after 'possession of drugs', insert ', unless in small quantities and for a non-commercial purpose'.

#### ARTICLE 4. GENERAL OBLIGATIONS

The parties shall take such legislative and administrative measures as may be necessary:

...

c) subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes:

i) **trade in drugs;**

ii) the production, manufacture, export, import, distribution of, ~~trade in, use~~ and possession of drugs, **unless in small quantities and for a non-commercial purpose.**

Article 9(4) – functions of the INCB

In Article 9(4), after ‘limit the’, insert ‘commercial’.

#### ARTICLE 9. COMPOSITION AND FUNCTIONS OF THE BOARD

4. The Board, in co-operation with Governments, and subject to the terms of this Convention, shall endeavour to limit the **commercial** cultivation, production, manufacture and use of drugs to an adequate amount required for medical and scientific purposes, to ensure their availability for such purposes and to prevent illicit cultivation, production and manufacture of, and illicit trafficking in, and use of, drugs.

Article 30(2)(b) – trade and distribution

In Article 30(2)(b)(i), after ‘dispensation of drugs to individuals’, insert ‘for medical use’.

#### ARTICLE 30. TRADE AND DISTRIBUTION

2. The Parties shall also:

...

b)(i) Require medical prescriptions for the supply, or dispensation of drugs to individuals **for medical use**. This requirement need not apply to such drugs as individuals may lawfully obtain, use, dispense or administer in connexion with their duly authorised therapeutic functions;

## Article 36 – penal provisions

In Article 36(1)(a), delete ‘offering,’.

### ARTICLE 36. PENAL PROVISIONS

1. a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, ~~offering~~, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

## 3.2 Proposed amendments to the 1971 Convention

### Article 1 – use of terms

Insert as Article 1(c) *bis*:

“Non-commercial purpose” means a purpose other than to receive pecuniary benefit.’

### ARTICLE 1. DEFINITIONS

c) “Board” means the International Narcotics Control Board provided for in the Single Convention on Narcotic Drugs, 1961.

**c) *bis* “Non-commercial purpose” means a purpose other than to receive pecuniary benefit.**

### New Article 2 *bis* – exemption for non-commercial actions

Insert as Article 2 *bis*:

‘Other than Article 7(a) and Article 9, this Convention does not apply to the cultivation, production, manufacture, extraction, preparation, offering, distribution, delivery, dispatch, transport, supply, purchase, acquisition, import, export, possession or use of psychotropic substances, or any similar or related action with respect to psychotropic substances where such action involves only a small quantity of psychotropic substances and is for a non-commercial purpose.’

## ARTICLE 2 *BIS*

Other than article 7(a) and article 9, this Convention does not apply to the cultivation, production, manufacture, extraction, preparation, offering, distribution, delivery, dispatch, transport, supply, purchase, acquisition, import, export, possession or use of psychotropic substances, or any similar or related action with respect to psychotropic substances where such action involves only a small quantity of substances and is for a non-commercial purpose.

### Article 5 – Limitation of use to medical and scientific purposes

In Article 5:

1. in the heading of Article 5, for 'Use' substitute 'Commercial Use'
2. in paragraph 1:
  - a) after 'limit the', insert ' trade in, and import, export, manufacture, distribution, possession and'
  - b) for 'as provided in Article 7', substitute 'to medical and scientific purposes'
3. in paragraph 2:
  - a) after 'stocks of,' insert 'and'
  - b) delete ', and use and possession of,'
4. delete paragraph 3.

## ARTICLE 5. LIMITATION OF ~~USE~~ **COMMERCIAL USE** TO MEDICAL AND SCIENTIFIC PURPOSES

Each Party shall limit the **trade in, and import, export, manufacture, distribution, possession and** use of substances in Schedule I ~~as provided in article 7~~ **to medical and scientific purposes.**

Each Party shall, except as provided in article 4, limit by such measures as it considers appropriate the manufacture, export, import, distribution and stocks of, **and** trade in, ~~and use and possession of,~~ substances in Schedules II, III and IV to medical and scientific purposes.

~~It is desirable that Parties do not permit the possession of substances in Schedules II, II and IV except under legal authority.~~

### Article 7 – Schedule I substances

In Article 7(a), for 'Prohibit all use except for scientific and very limited medical purposes', substitute 'Require all medical and scientific use to be undertaken or supervised'.

## ARTICLE 7. SPECIAL PROVISIONS REGARDING SUBSTANCES IN SCHEDULE 1

In respect of substances in Schedule 1, the Parties shall:

~~Prohibit all use except for scientific and very limited medical purposes~~ **Require all medical and scientific use to be undertaken or supervised** by duly authorised persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them;

...

## Article 9

In Article 9(1), after 'dispensed for', insert 'medical'.

## ARTICLE 9. PRESCRIPTIONS

1. The Parties shall require that substances in Schedules II, III and IV be supplied or dispensed for **medical** use by individuals pursuant to medical prescription only, except when individuals may lawfully obtain, use, dispense or administer such substances in the duly authorised exercise of therapeutic or scientific functions.

### 3.3 Proposed amendments to the 1998 Convention

#### Article 3 – offences and sanctions

In Article 3:

1. delete paragraph 2
2. in subparagraph 4(d):
  - a) for 'an offence', substitute 'any offence with respect to narcotic drugs or psychotropic substances'
  - b) for 'in accordance with paragraph 2', substitute 'other than as required by paragraph 1'.

## ARTICLE 3. OFFENCES AND SANCTIONS

...

~~2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or cultivation of narcotic drugs or psychotropic substances~~



~~for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.~~

...

4.

...

d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of ~~an offence~~ **any offence with respect to narcotic drugs or psychotropic substances** established ~~in accordance with paragraph 2~~ **other than as required by paragraph 1** of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

#### 4. OPTION 2 – REMOVE OBLIGATIONS TO PROHIBIT DOMESTIC NON-MEDICAL AND NON-SCIENTIFIC MARKETS IN DRUGS

The purpose of this option is to allow Parties to the Conventions to legalise domestic markets and international trade in controlled substances that will be used for other than medical or scientific purposes. Under Option 2, Parties would no longer be required to limit cultivation, production, manufacture, domestic trade, distribution, use or possession of drugs to medical and scientific purposes. Nor would Parties be required to limit import and export of drugs to these purposes. However, they would continue to be prohibited from allowing the export of drugs other than in accordance with the receiving country or territory's laws and regulations, and they would still be required to control import and export under licence, control all parties and enterprises undertaking import and export, and require specific import and export authorisations. In addition, if Parties were to decide to permit domestic non-medical and non-scientific markets in drugs, they would also be required to apply most of the existing control measures in the Conventions to those markets. For example, Parties would be required to ensure (under Articles 23, 26 and 28 of the 1961 Convention) that cultivation of and domestic trade in opium poppy, cannabis and coca for non-medical and non-scientific purposes would be controlled by a government agency. They would also be required to ensure (under Articles 29 and 30 of the 1961 Convention and Articles 7 and 8 of the 1971 Convention) that the manufacture, domestic trade in, and distribution of drugs for non-medical or non-scientific purposes would be under licence or authorisation. It is also proposed under Option 2 that the requirements for countries and territories to furnish estimates (in Article 19 of the 1961 Convention) and statistical returns in relation to their drug use and production (in Article 20 of the 1961 Convention and Article 16(4) of the 1971 Convention) and to prevent manufacture and import beyond their requirements (in Article 21 of the 1961 Convention) would be extended to non-medical or non-scientific use of drugs.

Under Option 2, the International Narcotics Control Board (INCB) would no longer be responsible for limiting domestic markets in drugs to medical and scientific purposes. Instead, the INCB's main roles in relation to domestic drug control would be to monitor medical and scientific and non-medical and non-scientific domestic markets in drugs

and to ensure adequate supplies of drugs to countries and territories for medical and scientific purposes (by analysing estimates and statistical returns). The INCB would continue to have a role in preventing illicit international trade.

Option 2 would also incorporate the aims of Option 1. Under Option 2, Parties would not be obliged to prohibit or penalise or criminalise domestic markets in drugs for non-medical use, so that domestic markets in one or more drugs could be legally permitted. Additionally, it is proposed that the general exemption of domestic actions involving small quantities of drugs for non-commercial purposes from the scope of the Conventions in Option 1 would also apply under Option 2 so that Parties would not be required to apply the control measures in the Conventions (government control, licensing, etc) to such actions.

The provisions of the Conventions that currently oblige the Parties or the INCB to limit domestic and international markets in drugs to medical or scientific purposes, or that are otherwise inconsistent with the aims of Option 2, and that would need to be amended and/or changed in effect, are:

- for the 1961 Convention: Preamble and Articles 1, 4(c), 9(4), 12(5), 19, 20, 21, 21 *bis*, 30(2)(b), 33 and 36.
- for the 1971 Convention: Articles 5, 7, 9, 16(4) and 22.
- for the 1988 Convention: Articles 3(1) and 3(2).

## 5. SUMMARY OF PROPOSED AMENDMENTS FOR OPTION 2

### 5.1 Proposed amendments to 1961 Convention

#### Preamble

In the preamble, in the paragraph of the beginning ‘Desiring’:

1. for ‘limiting such drugs to’, substitute ‘ensuring the availability of such drugs for’
2. after ‘medical and scientific use’, insert ‘preventing illicit traffic in such drugs,’.

#### PREAMBLE

The Parties

...

Desiring to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, ~~limiting such drugs to~~ **ensuring the availability of such drugs for** medical and scientific use, **preventing illicit traffic in such drugs**, and providing for continuous international co-operation and control for the achievement of such aims and objectives,

Hereby agree as follows:

Article 1 – definition of ‘non-commercial purpose’

Insert as Article 1(1)(o) *bis*:

“Non-commercial purpose” means a purpose other than to receive pecuniary benefit.’

ARTICLE 1. DEFINITIONS

1. Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout the Convention:

...

o) “Medicinal opium” means opium which has undergone the processes necessary to adapt it for medicinal use.

**o) *bis* “Non-commercial purpose” means a purpose other than to receive pecuniary benefit.**

Article 1 – definition of ‘stocks’

In Article 1(1)(x), for ‘medical and scientific’ substitute ‘licit’.

ARTICLE 1. DEFINITIONS

Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout the Convention:

...

x) “Stocks” means the amounts of drugs held in a country or territory and intended for:

- i) Consumption in the country or territory for ~~medical and scientific~~ **licit** purposes;
- ii) Utilisation in the country or territory for the manufacture of drugs and other substances, or
- iii) Export;

but does not include the amounts of drugs held in the country or territory,

- iv) By retail pharmacists or other authorised retail distributors and by institutions or qualified persons in the duly authorised exercise of therapeutic or scientific functions, or
- v) As “special stocks”.

Article 1 – definition of ‘consumed’

In Article 1(2), after ‘scientific research’, insert ‘, or personal use’.

ARTICLE 1. DEFINITIONS

...

2. For the purposes of this Convention a drug shall be regarded as “consumed” when it has been supplied to any person or enterprise for retail distribution, medical use or scientific research, **or personal use**; and “consumption” shall be construed accordingly.

New Article 3 *bis*

Insert as Article 3 *bis*:

‘Other than Article 30(2)(b), this Convention does not apply to the cultivation, production, manufacture, distribution, supply, purchase, acquisition, import, export, possession or use of drugs, or any similar or related action with respect to drugs where such action involves only a small quantity of drugs and is for a non-commercial purpose.’

ARTICLE 3 *BIS*

**Other than article 30(2)(b), this Convention does not apply to the cultivation, production, manufacture, distribution, supply, purchase, acquisition, import, export, possession or use of drugs, or any similar or related action with respect to drugs where such action involves only a small quantity of drugs and is for a non-commercial purpose.**

Article 4(c) – general obligation to limit use and actions to medical and scientific purposes

Delete Article 4(c).

ARTICLE 4. GENERAL OBLIGATIONS

The parties shall take such legislative and administrative measures as may be necessary:

...

~~(c) subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.~~

## Article 9(4) – functions of the INCB

In Article 9(4):

1. for 'limit', substitute 'monitor'
2. delete 'to an adequate amount required for medical and scientific purposes'
3. for 'their', substitute 'the'
4. after 'availability', insert 'of adequate quantities of drugs'
5. for 'such', substitute 'medical and scientific'
6. for 'cultivation, production and manufacture of, and, illicit trafficking in and use of', substitute 'import and export of'.

### ARTICLE 9. COMPOSITION AND FUNCTIONS OF THE BOARD

4. The Board, in co-operation with Governments, and subject to the terms of this Convention, shall endeavour to ~~limit~~ **monitor** the cultivation, production, manufacture and use of drugs ~~to an adequate amount required for medical and scientific purposes~~, to ensure ~~their~~ **the** availability of adequate quantities of drugs for ~~such~~ **medical and scientific** purposes and to prevent illicit ~~cultivation, production and manufacture of, and illicit trafficking in, and use of,~~ **import and export** of drugs.

## Article 12(5) – administration of the estimate system

In Article 12(5):

1. for 'limiting', substitute 'monitoring'
2. after 'monitoring the', insert 'cultivation, production, manufacture,'
3. delete 'to an adequate amount required for medical and scientific purposes'
4. for 'their', substitute 'the'
5. after 'availability', insert 'of adequate quantities of drugs'
6. for 'such', substitute 'medical and scientific'.

### ARTICLE 12. ADMINISTRATION OF THE ESTIMATE SYSTEM

The Board, with a view to ~~limiting~~ **monitoring** the **cultivation, production, manufacture**, use and distribution of drugs ~~to an adequate amount required for medical and scientific purposes~~ and to ensuring ~~their~~ **the** availability of adequate quantities of drugs for ~~such~~ **medical and scientific** purposes, shall as expeditiously as possible confirm the estimates, including supplementary estimates, or, with the consent of the Government concerned, may amend such estimates. In case of a disagreement between the Government and the Board, the latter shall have the right to establish, communicate, and publish its own estimates, including supplementary estimates.

## Article 19 – estimates of drug requirements

In Article 19(1):

1. in subparagraph (a), after 'medical and scientific purposes', insert ', and other purposes'
2. in subparagraph (b), after 'Convention', insert 'for medical and scientific purposes, and other purposes'
3. in subparagraph (c), after 'estimates relate', insert 'for medical and scientific purposes, and other purposes'
4. in subparagraph (f), after 'produced', insert 'for medical and scientific purposes, and other purposes'
5. In subparagraph (h), after 'preceding subparagraph', insert 'for medical and scientific purposes, and other purposes'.

### ARTICLE 19. ESTIMATES OF DRUG REQUIREMENTS

The Parties shall furnish to the Board each year for each of the territories, in the manner and form prescribed by the Board, estimates on forms supplied by it in respect of the following matters:

- a) Quantities of drugs to be consumed for medical and scientific purposes, **and other purposes;**
- b) Quantities of drugs to be utilised for the manufacture of other drugs, or preparations in Schedule III, and of substances not covered by this Convention **for medical and scientific purposes, and other purposes;**
- c) Stocks of drugs to be held as at 31 December of the year to which the estimates relate **for medical and scientific purposes, and other purposes;**
- d) Quantities of drugs necessary for addition to special stocks;
- e) The area (in hectares) and the geographical location of land to be used for the cultivation of the opium poppy;
- f) Approximate quantity of opium to be produced for medical and scientific purposes, and other purposes;
- g) The number of industrial establishments which will manufacture synthetic drugs; and
- h) The quantities of synthetic drugs to be manufactured by each of the establishments referred to in the preceding subparagraph **for medical and scientific purposes, and other purposes.**

## Article 20 – statistical returns

In Article 20(1):

1. in subparagraph (a), after 'drugs', insert 'for medical and scientific purposes, and other purposes'
2. in subparagraph (b), after 'drugs', insert 'for medical and scientific purposes, and other purposes'
3. in subparagraph (c), after 'drugs', insert 'for medical and scientific purposes, and other purposes'
4. in subparagraph (d), after 'poppy straw', insert 'for medical and scientific purposes, and other purposes'
5. in subparagraph (f), after 'thereof', insert 'for medical and scientific purposes, and other purposes'.

#### ARTICLE 20. STATISTICAL RETURNS TO BE FURNISHED TO THE BOARD

1. The Parties shall furnish to the Board for each of their territories, in the manner and form prescribed by the Board, statistical returns on forms supplied by it in respect of the following matters:

- a) Production or manufacture of drugs **for medical and scientific purposes, and other purposes;**
- b) Utilisation of drugs for the manufacture of other drugs, of preparations in Schedule III and of substances not covered by this Convention, and utilisation of poppy straw for the manufacture of drugs **for medical and scientific purposes, and other purposes;**
- c) Consumption of drugs **for medical and scientific purposes, and other purposes;**
- d) Imports and exports of drugs and poppy straw **for medical and scientific purposes, and other purposes;**
- e) Seizures of drugs and disposal thereof;
- f) Stocks of drugs and disposal thereof **for medical and scientific purposes, and other purposes;**
- g) Ascertainable area of cultivation of the opium poppy.

#### Article 21 – manufacture and import limits

In Article 21:

1. in subparagraph 1(a), for 'estimate' substitute 'estimates', and delete 'for medical and scientific purposes'
2. in subparagraph 1(b), for 'estimate' substitute 'estimates'
3. in subparagraph 1(d), for 'estimate' substitute 'estimates'.

## ARTICLE 21. LIMITATION OF MANUFACTURE AND IMPORTATION

1. The total of the quantities of each drug manufactured and imported by any country or territory in any one year shall not exceed the sum of the following:

- a) The quantity consumed, within the limit of the relevant ~~estimate~~**estimates**, ~~for medical and scientific purposes~~;
- b) The quantity used, within the limit of the relevant ~~estimate~~**estimates**, for the manufacture of other drugs, of preparations in Schedule III, and of substances not covered by the Convention;
- c) The quantity exported;
- d) The quantity added to the stock for the purpose of bringing that stock up to the level specified in the relevant ~~estimate~~**estimates**; and
- e) The quantity acquired within the limit of the relevant estimate for special purposes.

2. From the sum of the quantities seized in paragraph 1 there shall be deducted any quantity that has been seized and released for licit use, as well as any quantity taken from special stocks for the requirements of the civilian population

3. If the Board finds that the quantity manufactured and imported in any one year exceeds the sum of the quantities specified in paragraph 1, less any deductions required under paragraph 2 of this article, any excess so established and remaining at the end of the year shall, in the following year, be deducted from the quantity to be manufactured and imported and from the total of the estimates as defined in paragraph 2 of article 19.

Article 21 *bis* – limitation of opium production

In Article 21 *bis* (1):

1. after 'exceed the', insert 'sum of the'
2. for 'estimate', substitute 'estimates'.

## ARTICLE 21 *BIS*. LIMITATION OF PRODUCTION OF OPIUM

1. The production of opium by any country or territory shall be organised and controlled in such manner as to ensure that, as far as possible, the quantity produced in any one year shall not exceed the **sum of the** ~~estimate~~**estimates** of opium to be produced as established under paragraph 1(f) of article 19.

Article 30(2)(b) – medical prescription requirement

In Article 30(2)(b), after 'dispensation of drugs to individuals', insert 'for medical use'.



## ARTICLE 30. TRADE AND DISTRIBUTION

2. The Parties shall also:

...

b) (i) Require medical prescriptions for the supply, or dispensation of drugs to individuals **for medical use**. This requirement need not apply to such drugs as individuals may lawfully obtain, use, dispense or administer in connexion with their duly authorised therapeutic functions;

Article 33 – Possession of drugs

Delete Article 33.

## ~~ARTICLE 33. POSSESSION OF DRUGS~~

~~The Parties shall not permit the possession of drugs except under legal authority.~~

Article 36 – penal provisions

In Article 36(1)(a):

1. after 'each Party shall', for 'adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be' substitute 'treat as a'.
2. for 'offences', substitute 'offence'
3. after 'when committed intentionally', insert 'any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention'
4. after 'obligations under this Convention, and' insert 'shall ensure'.

## ARTICLE 36. PENAL PROVISIONS

1. a) Subject to its constitutional limitations, each Party shall ~~adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be~~ **treat as a punishable offence** when committed intentionally **any action**

**contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.**

## 5.2 Proposed amendments to the 1971 Convention

Article 1 – definition of ‘non-commercial purpose’

Insert as Article 1(c) *bis*:

“Non-commercial purpose” means a purpose other than to receive pecuniary benefit.’

### ARTICLE 1. USE OF TERMS

Except where otherwise expressly indicated, or where the context otherwise requires, the following terms in this Convention have the meanings given below:

...

*c bis*) “Non-commercial purpose” means a purpose other than to receive pecuniary benefit.’

New Article 2 *bis*

Insert as Article 2 *bis*:

‘Other than article 7(a) and article 9, this Convention does not apply to the cultivation, production, manufacture, distribution, supply, purchase, acquisition, import, export, possession or use of psychotropic substances, or any similar or related action with respect to psychotropic substances where such action involves only a small quantity of psychotropic substances and is for a non-commercial purpose.’

### ARTICLE 2 BIS

**‘Other than article 7(a) and article 9, this Convention does not apply to the cultivation, production, manufacture, distribution, supply, purchase, acquisition, import, export, possession or use of psychotropic substances, or any similar or related action with respect to psychotropic substances where such action involves only a small quantity of psychotropic substances and is for a non-commercial purpose.’**

Article 5 – limitation of use to medical and scientific purposes

Delete Article 5.

ARTICLE 5. LIMITATION OF USE TO MEDICAL AND SCIENTIFIC PURPOSES

1. Each Party shall limit the use of substances in Schedule I as provided in article 7.
2. Each Party shall, except as provided in article 4, limit by such measures as it considers appropriate the manufacture, export, import, distribution and stocks of, trade in, and use and possession of, substances in Schedules II, III and IV to medical and scientific purposes.
3. It is desirable that Parties do not permit the possession of substances in Schedules II, III and IV except under legal authority.

Article 7 – prohibition of use of schedule 1 substances

In Article 7, in subparagraph (a), for ‘Prohibit all use except for scientific and very limited medical purposes’ substitute ‘Require all medical and scientific use to be undertaken or supervised’.

ARTICLE 7. SPECIAL PROVISIONS REGARDING SUBSTANCES IN SCHEDULE 1

In respect of substances in Schedule 1, the Parties shall:

- a) ~~Prohibit all use except for scientific and very limited medical purposes~~ **Require all medical and scientific use to be undertaken or supervised** by duly authorised persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them;

...

Article 9 – medical prescriptions

In Article 9, in subparagraph 1, after ‘dispensed for’, insert ‘medical’.

ARTICLE 9. PRESCRIPTIONS

1. The Parties shall require that substances in Schedules II, III and IV be supplied or dispensed for **medical** use by individuals pursuant to medical prescription only, except when individuals may lawfully obtain, use, dispense or administer such substances in the duly authorised exercise of therapeutic or scientific functions.

...

Article 16(4) – statistical reports

In Article 16(4):

1. in subparagraph (a):
  - a) after 'Schedules I and II, on', insert a colon
  - b) on a new line, for the remainder of the subparagraph, substitute:
    - i) quantities manufactured for medical and scientific purposes, and other purposes;
    - ii) stocks held by manufacturers for medical and scientific purposes, and other purposes;
    - iii) quantities exported to and imported from each country or region, for medical and scientific purposes, and other purposes;
2. in subparagraph (b):
  - a) after 'Schedules III and IV, on', insert a colon
  - b) on a new line, substitute for the remainder of the subparagraph:
    - i) quantities manufactured for medical and scientific purposes, and other purposes; and
    - ii) total quantities exported and imported, for medical and scientific purposes, and other purposes'
3. in subparagraph (c), after 'preparations', insert 'for medical and scientific purposes, and other purposes'.

#### ARTICLE 16. REPORTS TO BE FURNISHED BY THE PARTIES

...

4. The Parties shall furnish to the Board annual statistical reports in accordance with forms prepared by the Board:
  - a) In regard to each substance in Schedules I and II, on: ~~quantities manufactured, exported to and imported from each country or region as well as on stocks held by manufacturers~~
    - i) quantities manufactured for medical and scientific purposes, and other purposes;**
    - ii) stocks held by manufacturers for medical and scientific purposes, and other purposes;**
    - iii) quantities exported to and imported from each country or region, for medical and scientific purposes, and other purposes;**
  - b) In regard to each substance in Schedules III and IV, on: ~~quantities manufactured, as well as on total quantities exported and imported~~
    - i) quantities manufactured for medical and scientific purposes, and other purposes; and**
    - ii) total quantities exported and imported for medical and scientific purposes, and other purposes;**

c) In regard to each substance in Schedules I and II, on quantities used in the manufacture of exempt preparations **for medical and scientific purposes, and other purposes**, and

d) In regard to each substance other than a substance in Schedule I, on quantities used for industrial purposes in accordance with subparagraph b) of article 4.

The quantities manufactured which are referred to in sub-paragraphs a) and b) of this paragraph do not include the quantities of preparations manufactured.

### 5.3 Proposed amendments to the 1988 Convention

Article 1(m) – definition of ‘illicit traffic’

In Article 1(m):

1. for ‘paragraphs’ substitute ‘paragraph’
2. delete ‘and 2’.

#### ARTICLE 1. DEFINITIONS

Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout this convention:

...

m) “illicit traffic” means the offences set forth in article 3, ~~paragraphs~~ **paragraph 1 and 2**, of this Convention.

Article 3 – penal provisions

In Article 3:

1. in subparagraph (a)(i), for ‘The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drugs or any psychotropic substance’, substitute ‘Any action’
2. after ‘contrary to’, insert ‘a law or regulation adopted in pursuance of its obligations under’
3. delete:
  - a) subparagraph (a)(ii)
  - b) subparagraph (a)(iii)
  - c) paragraph 2
4. in paragraph (4)(d):
  - a) for ‘an offence’, substitute ‘any offence with respect to narcotic drugs or psychotropic substances’

- b) for 'in accordance with paragraph 2' substitute 'other than as required by paragraph 1'.

### ARTICLE 3. OFFENCES AND SANCTIONS

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

- a) i) ~~The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drugs or any psychotropic substance~~ **Any action** contrary to a **law or regulation adopted in pursuance of its obligations under** the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.
- ii) ~~The possession or purchase of any narcotic drug or psychotropic substance for the purposes of any of the activities enumerated in (i) above;~~
- iii) ~~The possession or purchase of any narcotic drug or psychotropic substance for the purposes of any of the activities enumerated in (i) above;~~

...

~~2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provision of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.~~

...

4. (d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of ~~an~~ **any** offence **with respect to narcotic drugs or psychotropic substances** established ~~in accordance with paragraph 2~~ **other than as required by paragraph 1** of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

# Chapter 6. Reform by subtraction: allowing legalisation of possession and use, or allowing for a regulated market by reservation

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## 1. CONSIDERATIONS IN TAKING THE PATH OF DENUNCIATION AND REACCESSION WITH RESERVATIONS

IN THIS CHAPTER, possible approaches and draft language are suggested for reservations directed towards two potential objectives: (1) making it unambiguously legitimate for possession and use and related actions of one or more controlled substances to be decriminalised (A1), or, in an extension of this, not to be punishable offences (A2); and (B) providing for the possibility of a legal regulated domestic market in one or more controlled substances. The approach is through denunciation and reaccession with a reservation, already discussed in Chapter 3.

As noted in that chapter, reservations to a treaty cannot add new language to a treaty; they can only subtract language or give an interpretation or specification of it, usually limiting its application. The approach taken in this chapter thus differs somewhat from the approaches in Chapter 5 and the Appendix, since there in part the approach involves adding language. Reflecting that difference in approach, the options dealt with in this chapter are labelled A and B, whereas those dealt with in Chapter 5 and the Appendix have been labelled Options 1 and 2.

One decision to be made in this circumstance is whether the reservation should state a general interpretation or limitation concerning the Convention to which it applies as a whole; should state a general interpretation or limitation for specific articles or clauses; or should be very specific about an exception or interpretation of particular words or phrases. Existing reservations to the drug conventions (see the tables in Chapter 3) take all three of these approaches. Our suggestions here generally take the middle of these paths, that is, specifying particular articles or clauses to which they apply, but with a general statement about whether and how they will apply in the country making the reservation. Related to this decision is the question of whether a reservation is needed to every clause in the convention which could conceivably be argued to stand in the way of a desired course of action, or whether instead to make the national intent clear by reservations to the main impeding clauses. Here the latter approach is taken.<sup>83</sup>

For the two objectives dealt with here, the primary concern is with expanding the space allowed by the Conventions for national action and choices concerning nonmedical and nonscientific use of substances controlled by the Conventions. While the Conventions

<sup>83</sup> Thus no action is suggested concerning the phrase in the Preamble to the 1961 Convention (“limiting such drugs to medical and scientific use”), or the various provisions in that Convention (in Articles 9, 12, 12, 19, 20 and 21) mentioning “medical and scientific purposes” which are basically concerned with the international estimation system.

include a number of general statements about limiting controlled substances to 'medical and scientific use', they also acknowledge in various ways that there will be legitimate uses of the substances other than in medicine or science.<sup>84</sup> The suggested reservations thus adjust the boundaries of what is covered under the conventions domestically in the country concerned, rather than create new boundaries. For the first set of options laid out here, concerning decriminalisation of use and related actions, the expansion in freedom of action required is for the state not to be obliged to take actions which otherwise the conventions can be argued to require. The scope of the suggested reservations for this path is accordingly quite limited. In the second objective, allowing for a legal regulated domestic market options, the state is an active player – in fact, the more regulated the market is, the more active the state must be – and more provisions of the treaties are affected.

While post-ratification reservations to treaties is a theoretical possibility, as discussed in Chapter 3 this approach is unlikely to be used in present circumstances for the drug Conventions. Thus the first step in putting this chapter's path into effect will be to denounce one or more of the Conventions, and accordingly the first decision to be taken is which one or more of the treaties it is desired to make reservations to. If the desire is simply to lift the requirement that drug use or associated behaviours be required to be a criminal offence (Option A1), denunciation only of the 1988 Convention would be needed. At the other end of the spectrum, if it is desired to establish regulated nonmedical markets in cannabis and MDMA (Ecstasy), all three of the conventions must be denounced, since cannabis is under the 1961 treaty and MDMA under the 1971 treaty.

As this suggests, an early decision will be required on whether the reservations will concern specific substances or classes of substances, or will be made more generally. Even if the present intent is simply to legalise a regulated nonmedical market for cannabis, for instance, it might be decided to state the reservations more generally, without specifying any substance, to allow greater freedom of action for future choices. The counterargument against stating reservations in more general terms would presumably be that limiting the scope of the reservations might diminish the annoyance of other parties to the treaty, and make objections less likely and pressure or counteractions on other policy fronts less intense. On the other hand, stating the reservations more generally would avoid a possible future need to go through a clumsy and time-consuming process again. With respect to Option A, it might be noted that there seems to be an international trend for decriminalisation of possession and use increasingly to be of controlled substances in general rather than limited, for instance, to cannabis.<sup>85</sup>

Given the likely international opposition to the path discussed here, it would be wise for any country taking it to be clear from the start about what their intended end-point is. As in the Bolivian case noted in Chapter 3, the intention to reaccede with reservations

<sup>84</sup> E.g., the 1961 Convention's Articles 19(1)(b), 25, 27, 28; the 1971 Convention's Articles 3(3), 4.

<sup>85</sup> Room, R., Reuter, P. (2012) 'How well do international drug conventions protect public health?' *The Lancet* 379 (Jan. 7):84–91.



should be announced along with denunciation. By the time the denunciation takes effect, the actual proposed reservations should be announced. As discussed in section 3.3 of Chapter 3, accession to the treaties can be accomplished in one month, while the period for objections to reservations is 12 months. But, given the uncertainty about the result in case of sufficient reservations to block a reservation, it would be wise to follow Bolivia's path (at least for reservations to the amended 1961 and the 1971 conventions), and announce that the reaccession will only go into effect if the reservations are accepted, that is, after a lapse of 12 months.

For countries considering taking this path, a clear warning is stated here. This chapter was not written by a lawyer. Which sections of the treaties are considered to require reservations for the option the country is considering should be checked, and the actual language of the reservations should be redrafted, by a competent lawyer. The intent here is to sketch out concretely what the terrain might look like in proceeding down this path.

## 2. OPTION A: REMOVING THE REQUIREMENTS THAT POSSESSION OR USE BE A PUNISHABLE AND CRIMINAL OFFENCE

### Option A1

The main requirement in the drug treaties which requires a party to criminalise possession or use is Article 3, paragraph 2 of the 1988 Convention, which requires parties "to establish as a criminal offence under domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption...."

A reservation against this provision would remove the requirement that possession and use be made a criminal offence. This reservation could be the same as Switzerland made at the time of its accession to the treaty: "X does not consider itself bound by Article 3, Paragraph 2, concerning the maintenance or adoption of criminal offences under legislation on narcotic drugs". Or, more simply, it could just say: "**X is not bound by Article 3, Paragraph 2**".

A reservation for Article 3, Paragraph 1 would also be desirable, to ensure that there is no obligation under that provision to criminalise any of the actions listed there when they are undertaken only for the purpose of personal consumption. This reservation might read: "**X is not bound by Article 3, Paragraph 1 as far as that provision relates to actions that involve small quantities of drugs and that are not undertaken for pecuniary benefit**".

### Option A2

This option would be additional to Option A1, to make clear that possession or use do not have to be "punishable" offences. In Article 36, Paragraph 1 of the 1961 Convention it is required that a long list of acts including "possession" and "offering" "shall be punishable offences when committed intentionally". Articles 4(c) and 33 also relate to

the legality of drug possession. A reservation could take the form: **“X is not bound by Article 36, Paragraph 1, by Article 4(c), or by Article 33, insofar as these provisions relate to possession or offering of small quantities of controlled substances for purposes other than to receive pecuniary benefit, or other actions incidental to this exclusion”**.

In Article 7(a), the 1971 Convention requires that parties “shall prohibit all use except for scientific and very limited medical purposes” of substances in Schedule I (which includes MDMA, LSD and psilocybine), and by Article 22, Paragraph 1(a) it is required that “parties shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention...”. A reservation concerning the punishability of use could take the form, **“X is not bound by Article 22 insofar as that provision relates to possession or use of small quantities of controlled substances for purposes other than to receive pecuniary benefit, or other actions incidental to this exclusion. X is also not bound to prohibit under Article 7(a) such possession or use or incidental actions”**.

It should be noted that the reservations suggested above to the 1961 and 1988 Conventions, if not stated in terms of particular substances, would also accomplish another goal desired by several countries: clarifying the legality under the Conventions of treatment of heroin addicts through a system including safe consumption rooms and heroin-assisted treatment, since the main objection of the INCB to safe consumption rooms has been that it “condones illicit use” and thus “runs counter to the provisions of the international drug control treaties”.<sup>86,87</sup> Such measures would of course only be legal and thus in conformity with the Conventions if the country actually decriminalised the behaviour desired in the safe consumption room or other treatment.

### 3. OPTION B: MAKING POSSIBLE A LEGAL REGULATED DOMESTIC MARKET IN CANNABIS AND/OR OTHER CONTROLLED SUBSTANCES

The reservations suggested under Option A2 should be made in addition to those suggested here.

With respect to plants covered by the 1961 Convention (opium, coca, the flowering or fruiting tops of cannabis), the Convention provides that a government agency must be the wholesaler to which the domestic production is delivered and which receives imports (Article 23 for opium; Article 26 for coca, Article 28 for cannabis). This is further discussed in section 4.11 of the Appendix. If a nation wishes to provide a legal domestic market without such a government monopoly, a reservation will have to be made

<sup>86</sup> INCB. *Report of the International Narcotics Control Board for 2002*. New York: United Nations, 2002. [http://www.incb.org/incb/en/annual\\_report\\_2002.html](http://www.incb.org/incb/en/annual_report_2002.html) (accessed 8 July, 2012)

<sup>87</sup> Room, R., ‘Impact and implications of the international drug control treaties on IDU and HIV/AIDS prevention and policy’. In: Rehm, J., Fischer, B. & Haydon, E., eds. *Reducing the Risks, Harms and Costs of HIV/AIDS and Injection Drug Use (IDU): A Synthesis of the Evidence Base for Development of Policies and Programs*, pp. 218–227. Toronto: University of Toronto, report to Health Canada, 2003.

against the relevant article or articles. In the case of opium, a reservation concerning provisions in Article 21 *bis* should also be considered.

Other provisions of the 1961 Convention for which reservations should be made concerning the substances to be covered include a provision in Article 21 concerning the quantity to be manufactured and imported: **“X is not bound by Article 21, Paragraph 1(a), with respect to the limitation of [specified substances] ‘for medical and scientific purposes’”**. To provide for a regulated legal market not confined to use for medical or scientific purposes, the following reservation is suggested: **“X is not bound by Article 36, Paragraphs 1 and 2, by Article 4(c), by Article 30, Paragraph 2(b(i), or by Article 33, insofar as these provisions relate to legal domestic production or trade in [specified substances]”**.

With respect to substances covered by the 1971 Convention, the following formulation is suggested: **“X is not bound by Article 22 insofar as that provision relates to legal domestic production or trade in [specified substances]. X is also not bound under Article 5, Paragraph 2 and Article 9, Paragraph 1 to limit activities concerning such substances to medical and scientific purposes, and to prohibit under Article 7(a) such legal domestic production or trade”**.

A reservation to the 1988 Convention will also be required to avoid conflict with it in the case of the establishment of a legal domestic market in any substance covered under the 1961 or 1971 Convention. **“X is not bound by Article 3, paragraphs 1 and 2, with respect to legal domestic trade in [specified substances]”**.

## Chapter 7. Conforming the 1961 Convention to the standards of the 1971 Convention

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### 1. REMOVING OBLIGATIONS TO PROHIBIT DOMESTIC NON-MEDICAL AND NON-SCIENTIFIC MARKETS IN DRUGS, AND APPLYING 1971 CONVENTION CONTROL MEASURES

THIS CHAPTER SETS out a further option for changes in the Conventions, specifically to change the 1961 Convention so that the provisions on international surveillance and control of markets for narcotic drugs controlled under that Convention are in line with the level of control provided in the 1971 Convention for psychotropic substances. This does not mean that the degree of control will be equal for all substances: both the 1961 and the 1971 treaties have several schedules into which the different drugs they cover are sorted, which allow for differing degrees of surveillance and control exercised by the international drug control system.

The idea of this third option arose in the course of working through the texts of and arrangements in the treaties for the second option in Chapter 5, that is, to reformulate the treaties so that it would be permissible for a Party to them to legalise a regulated market for one or more drugs. The demands of the 1961 treaty for centralised management of the production and trade in the substances covered by it are heavy, and in many ways unrealistic because the system was conceived at a time when the illicit markets for the prohibited drugs were much smaller than today. The language in the treaty is broad and inclusive about the drugs covered, but the present-day reality is much narrower: the main focus in the statistics and the mechanisms available in the treaty are on opium and its derivatives, as evidenced in the INCB's 434-page annual report for 2011 on the statistics reported to it for drugs covered by the 1961 treaty.<sup>88</sup>

The INCB's main extra task under the 1961 treaty, compared to the 1971 treaty, is to manage the market for opioids for medical use. Even by its own account, the record is spotty. The Chair of the INCB reported in 2000 that the 'shortfalls of morphine and other pain-relieving medicines could be called dramatic', and he cited 'the inadequacy of national drug control systems,... over-restrictive regulations, difficult administrative procedures [and] concerns about diversion' as among the contributing factors. While INCB it could point with pride to having detected 'no diversions of narcotic drugs from licit [pharmaceutical] trade into the illicit traffic' in the year discussed,<sup>89</sup> it is doubtful that this is much of an achievement, considering both the size of the illicit market and

<sup>88</sup> International Narcotics Control Board, *Narcotic Drugs: Estimated World Requirements for 2011; Statistics for 2009*. New York: United Nations, 2011. [http://www.incb.org/incb/en/narcotic\\_drugs\\_2010.html](http://www.incb.org/incb/en/narcotic_drugs_2010.html) (accessed 24 August, 2011).

<sup>89</sup> Lourenço Martins, A., Statement of the President of the INCB, 43<sup>rd</sup> Commission on Narcotic Drugs, 6–15 March, 2000, Vienna. <http://www.incb.org/incb/speeches.cnd43-00.html> (accessed 24 August, 2011).

the substantial issue in the US and other wealthy countries of medically facilitated over-use of opioids. In the present-day world, the system of surveillance and direction under the 1961 treaty is an anachronism and an anomaly.

This further option was thus carried out as an adjunct to amendment Option 2 summarised in Chapter 5. If Parties were allowed to legalise markets in narcotic drugs and psychotropic substances for other than medical and scientific purposes, then the system for drugs covered under the 1961 Convention could be simplified by bringing it into alignment with the market controls required for Schedule II, III and IV psychotropic substances under the 1971 Convention. To achieve this, changes are proposed to a number of the controls in the 1961 Convention. These would either remove controls that have no corresponding control under the 1971 Convention, or replace them with controls that mirror or closely resemble relevant controls in the 1971 Convention. In particular, it is proposed under this option that the estimate system established under the 1961 Convention should be abolished, and that manufacture and import and opium production limits provided for in the 1961 Convention should be removed (as the 1971 Convention does not provide these measures). In addition, it is proposed that the current requirements in the 1961 Convention for governments to control and establish trade monopolies in relation to the opium poppy, coca bush and cannabis industries should be removed. These requirements should be replaced with less onerous requirements for cultivation, production, trade and distribution of these drugs to be licensed and controlled by governments, as per Article 8 of the 1971 Convention (applying to manufacture, trade and distribution of Schedule II, III and IV psychotropic substances).

The provisions of the 1961 Convention, as amended by the 1972 Protocol, that would need additional or different amendments under this option (in comparison with Option 2 in Chapter 5) are Articles 2, 12, 19, 21, 21 *bis*, 23, 26, 28, 29 and 30.

## 2. APPROACH TO AMENDING THE 1961 CONVENTION IN OPTION 3

The proposed approach to amending the Conventions under Option 3 is the same as that for Option 2 in respect of the 1971 Convention and the 1988 Convention. The approach is also the same under both options in respect of Articles 4(c), 9(4), 20 and 36 of the 1961 Convention. However, as noted above, under Option 3 different or additional amendments are proposed of Articles 12, 19, 21, 21 *bis*, 23, 26(1), 28(1), 29 and 30 of the 1961 Convention (along with consequential amendments of Articles 2 and 27 of the Convention).

It is proposed to remove from the Convention Articles 12 and 19, which establish the estimate system, and Articles 21 and 21 *bis*, which impose manufacture and import limits, and opium production limits (respectively). It is also proposed to remove Articles 23, 26 and 28(1), which require opium poppy, coca bush and cannabis cultivation and trade to be controlled and monopolised by a government agency. Instead, Article 29, which currently requires government licensing of drug manufacture (similar to the requirements of Article 8 of the 1971 Convention), should be extended to opium poppy, coca bush and cannabis cultivation. Domestic trade in those drugs should be governed

solely by Article 30, which requires trade in or distribution of drugs to be under licence (also similar to the requirements of Article 8 of the 1971 Convention).

Discussed below are the amendments proposed to the 1961 Convention under Option 3 that are in addition to, or that depart from, the amendments proposed to the 1961 Convention under Option 2 in Chapter 5.

### **3. THE 1961 CONVENTION**

#### **3.1 Article 12**

As discussed above, it is proposed that the estimate system should be abolished under Option 3. Therefore, Article 12 of the 1961 Convention, which provides for the INCB's administration of the estimate system, should be deleted for the purposes of this option.

##### **3.1.1 Amendment of Article 12**

Article 12 should be deleted.

#### **3.2 Article 19**

As discussed, Article 19 sets out the requirements for Parties to furnish estimates to the INCB of their territories' drug requirements and/or production/manufacture (paragraphs 1, 3 and 4), methods for calculating totals of the estimates (paragraph 2), and the requirement for Parties not to exceed the estimates (paragraph 5). It would therefore need to be removed from the 1961 Convention for the purposes of this option.

##### **3.2.1 Amendment of Article 19**

Article 19 should be deleted.

#### **3.3 Article 21**

As discussed above, paragraphs 1 and 2 of Article 21 of the 1961 Convention require Parties to ensure that quantities of drugs manufactured and imported by any country or territory in a given year do not exceed the quantities of drugs that have been consumed, used, exported, added to the stock and acquired for special purposes. Paragraph 3 of Article 21 allows the INCB to deduct any excess quantities manufactured or imported from the country or territory's total of the estimates, and paragraph 4 allows the INCB to impose an embargo on future exports to a country if the quantity of drugs exported to that country exceeds the total of the estimates. Under this option it is proposed that manufacture and import limits and the estimate system, which are not provided for in the 1971 Convention, should be abolished. Accordingly, Article 21 should be deleted from the 1961 Convention.

### 3.3.1 Amendment of Article 21

Article 21 should be deleted.

### 3.4 Article 21 *bis*

As discussed, it is proposed under this option that opium production limits and the estimate system should be abolished. Therefore, Article 21 *bis* would also need to be removed from the 1961 Convention for the purposes of this option.

#### 3.4.1 Amendment of Article 21 *bis*

Article 21 *bis* should be deleted.

### 3.5 Articles 23, 26(1) and 28(1)

Article 23 requires the establishment of a government agency to control opium cultivation and production, and to maintain a trade monopoly in relation to opium import, export, wholesale trade and the holding of opium stocks. Articles 26(1) and 28(1) impose essentially equivalent requirements in relation to the coca bush and leaves, and to the cannabis plant (respectively). As discussed above, an aim of the present option is for these control measures to be replaced with a general requirement for cultivation, trade in and distribution of opium, coca bush and leaves and cannabis to be controlled by government under licence, as per Article 8 of the 1971 Convention. Therefore, it is proposed under this option that Articles 23, 26(1) and 28(1) should be deleted, and that government licensing of opium poppy, coca bush and cannabis cultivation should be required under Article 29 (with some amendments to follow the approach taken under Article 8 of the 1971 Convention).

#### 3.5.1 Amendment of Articles 23, 26(1) and 28(1)

Articles 23, 26(1) and 28(1) should be deleted.

### 3.6 Article 29

As noted above, it is proposed under this option that Article 29 of the 1961 Convention should be amended to extend the requirements for government licensing and control of drug manufacture to cultivation and production of opium, coca bush/leaf and cannabis (in place of the requirements for the establishment of government agencies to control opium, coca bush/leaf and cannabis cultivation in Articles 23, 26(1) and 28(1), which should be deleted).

To achieve this, paragraph 1 of Article 29 should be amended to state that Parties shall require *cultivation, production* and manufacture to be under licence *or other similar control measure*. In addition, the exception for manufacture carried out by a State enterprise should be removed. This follows the approach taken under Article 8 of the 1971 Convention. The 1971 Commentary on Article 8 suggests that a state enterprise carrying on trade activities referred to in paragraph 1 would be authorised by the Government to

do so, and consequently would be considered to be under licence or other similar control measure. Therefore, there is no apparent need to retain the State enterprise exception. The 1971 Commentary notes that there is no substantive difference between a 'licence' and 'other similar control measure', but the latter words were used in Article 8 to make it clear that a government authorisation not specifically named as a licence would be sufficient.

Subparagraph 2(a) of Article 29 should be similarly amended to require Parties to control persons and enterprises undertaking cultivation or production of drugs, and subparagraph 2(b) of Article 29 should be amended to require Parties to control (under licence or other similar control measure) *the land on*, or establishments and premises, in which such cultivation or production takes place.

In addition, subparagraph 2(a) should be amended to specify that only 'duly authorised' persons or enterprises that cultivate or produce drugs must be controlled, following the approach in Article 8 of the 1971 Convention. The 1971 Commentary explains that the qualifying phrase 'duly authorised' was included in Article 8(2)(a) to avoid requiring Parties to control (through measures such as physical searches) *all* persons entering or leaving places of manufacture, including, for example, tradespersons and office workers, and that 'duly authorised' persons would include those persons licensed to undertake manufacture, trade in or distribution of Schedule II, III and IV substances under Article 8(1). Accordingly, 'duly authorised' persons and enterprises in Article 29(2)(a) would refer to persons or enterprises licensed to cultivate, produce or manufacture drugs under Article 29(1).

The requirement in subparagraph 2(c) of Article 29 for licensed manufacturers of drugs to obtain periodical permits specifying the kinds and amounts of drugs they may manufacture should be removed, as there is no corresponding requirement in the 1971 Convention, and there would not be the same need for periodical permits under Option 3 following the removal of manufacture and import limits under Article 21 (discussed above). The 1971 Commentary explains that the rationale for the requirement for periodical permits was to ensure that states that meet (some or all of) their drug requirements through drug manufacture would be able to allocate quotas to each of their manufacturers to ensure that they would not exceed annual manufacture and import limits.<sup>90</sup>

Article 8(2)(c) of the 1971 Convention makes specific provision for Parties to provide that security measures be taken with regard to establishments and premises in which manufacture, trade or distribution of substances takes place. The 1971 Commentary suggests that this measure would already be required by implication under 1961 Convention as part of subparagraph (2)(c), which requires establishments and premises in which drugs are manufactured to be controlled under licence. The Commentary explains that the obligation to take security measures was included explicitly in the 1971 Convention to indicate that one of the main purposes of control of establishments and

<sup>90</sup> 1971 Commentary, pp. 322–232.



premises is prevention of diversion.<sup>91</sup> There would be no need to make specific provision for this in Article 29.

The requirement in paragraph 3 of Article 29 for Parties to prevent the accumulation by drug manufacturers of drugs and poppy straw in excess of quantities required for the normal conduct of business should also be removed, as there is no corresponding requirement in the 1971 Convention.

### 3.6.1 Amendment of Article 29

The following amendments should be made to Article 29:

1. In paragraph 1:
  - a) after 'require that the', insert 'cultivation, production and'
  - b) for 'except where such manufacture is carried out by a State enterprise or State enterprises', substitute 'or other similar control measure'
2. In paragraph 2:
  - a) In subparagraph (a):
    - i) after 'Control all', insert 'duly authorised'
    - ii) after 'engaged in the', insert 'cultivation, production or'
  - b) In subparagraph (b):
    - i) after 'licence', insert 'or other similar control measure'
    - ii) after 'control measure the', insert 'land on, or'
    - iii) after 'premises in which such', insert 'cultivation, production or'
    - iv) after 'may take place', delete ', and'
  - c) Delete subparagraph (c)
3. Delete paragraph 3.

#### ARTICLE 29. MANUFACTURE

1. The Parties shall require that the **cultivation, production and manufacture of drugs be under licence or other similar control measure**~~except where such manufacture is carried out by a State enterprise or State enterprises.~~

2. The Parties shall:

a) Control all **duly authorised** persons and enterprises carrying on or engaged in the **cultivation, production or** manufacture of drugs;

b) Control under licence **or other similar control measure** the **land on, or** establishments and premises in which such **cultivation, production or** manufacture may take place;  
~~and~~

<sup>91</sup> 1971 Commentary, p. 176.

~~(c) Require that licensed manufacturers of drugs obtain periodical permits specifying the kinds and amounts of drugs which they shall be entitled to manufacture. A periodical permit, however, need not be required for preparations.~~

~~3. The Parties shall prevent the accumulation, in the possession of drug manufacturers, of quantities of drugs and poppy straw in excess of those required for the normal conduct of business, having regard to the prevailing market conditions.~~

### 3.7 Article 30

Article 30 of the 1961 Convention imposes substantially the same requirements with respect to domestic trade and distribution of drugs as Article 8 of the 1971 Convention imposes on the trade and distribution of psychotropic substances, and should, therefore, be retained.

However, the general phrase ‘or other similar control measure’ should be added to subparagraph (1)(a) of Article 30, and the qualifying phrase ‘duly authorised’ should be added to subparagraph 1(b)(i), for the same reasons as in relation to Article 29.

The 1971 Commentary explains that the phrase ‘duly authorised’ in Article 1(2)(a) covers persons authorised to perform therapeutic and scientific functions as referred to in Article 8(3), as well as persons licensed to undertake manufacture, trade in or distribution of Schedule II, III and IV substances under Article 8(1). Accordingly, ‘duly authorised’ persons and enterprises under the amended Article 30 would refer to persons and enterprises licensed to trade in and distribute drugs under paragraph 1(a) of that article, and persons duly authorised to perform therapeutic or scientific functions, as referred to in paragraph 1(c).

The 1971 Commentary explains that Article 8(3) exempts persons duly authorised to perform therapeutic and scientific functions from paragraphs 1 and 2 of Article 8, but only as the provisions relate to licensing or other control measures. Therefore, Article 8(3) exempts such persons from paragraph 1 and subparagraphs (b) and (c) of paragraph 2, but not from subparagraph (a) of paragraph 2, which does not refer to licensing or other control measures. The Commentary suggests that Parties would be required to ensure that medical practitioners and scientists take reasonable measures to prevent diversion of their supplies of Schedules II, II or IV substances in order to fulfil their obligation to ‘control’ such persons.<sup>92</sup> The same reasoning would apply in relation to Article 30 of the 1961 Convention.

Subparagraph 2(a) of Article 30, which requires Parties to prevent the accumulation by drug traders, distributors, State enterprises or duly authorised persons of drugs and poppy straw in excess of quantities required for the normal conduct of business, should also be removed, as there is no corresponding requirement in the 1971 Convention.

<sup>92</sup> 1971 Commentary, p. 173.

The amendment to subparagraph 2(b)(i) proposed under Option 2 in Chapter 5 to specify that medical prescriptions must be required for the supply of drugs to individuals 'for medical use' should be retained under this option.

### 3.7.1 Amendment of Article 30

The following amendments should be made to Article 30:

1. In subparagraph 1(a), for 'except where such manufacture is carried out by a State enterprise or State enterprises', substitute 'or other similar control measure'
2. In subparagraph 1(b)(i), after 'Control all', insert 'duly authorised'
3. Delete subparagraph 2(a).

In addition, the following amendment should be made to subparagraph 2(b)(i), as proposed under Option 2 in Chapter 5:

After 'dispensation of drugs to individuals', insert 'for medical use'.

#### ARTICLE 30. TRADE AND DISTRIBUTION

1. a) The Parties shall require that the trade in and distribution of drugs be under licence **or other similar control measure** ~~except where such trade or distribution is carried out by a State enterprise or State enterprises:~~

b) The Parties shall:

- (i) Control all **duly authorised** persons and enterprises carrying on or engaged in the trade in or distribution of drugs;
- (ii) Control under licence the establishments and premises in which such trade or distribution may take place. The requirement of licensing need not apply to preparations.

The provisions of a) and b) relating to licensing need not apply to persons duly authorised to perform and while performing therapeutic or scientific functions.

2. The Parties shall also:

~~a) Prevent the accumulation in the possession of traders, distributors, State enterprises or duly authorised persons referred to above, of quantities of drugs and poppy straw in excess of those required for the normal conduct of business, having regard to the prevailing market conditions; and~~

b) (i) Require medical prescriptions for the supply, or dispensation of drugs to individuals **for medical use**. This requirement need not apply to such drugs as individuals may lawfully obtain, use, dispense or administer in connexion with their duly authorised therapeutic functions; and

- (ii) If the Parties deem these measures necessary or desirable, require that prescriptions for drugs in Schedule 1 should be written on official forms to be

issued in the form of counterfoil books by the competent governmental authorities or by authorised professional associations.

...

### **3.8 Article 31(1)(b)**

Article 31(1)(b) prohibits Parties from knowingly permitting the export of drugs to a country or territory other than within the limits of the total of the estimates for that country or territory (as defined in Article 19(2)), with the addition of the amounts intended to be re-exported. As it is proposed that the estimates system should be deleted under this option, Article 31(1)(b) should also be deleted.

#### **3.8.1 Amendment of Article 31(1)(b)**

Article 31(1)(b) should be deleted.

### **3.9 Consequential amendments: deletions from Articles 2 and 27(2)**

Article 2 of the 1961 Convention sets out the measures of control that are applicable to different categories of drugs and preparations under the Convention. It does this by citing the provisions of the Convention imposing control measures that apply to drugs or preparations in Schedules I, II, III, IV and V. Article 2 currently refers to a number of provisions of the Convention imposing control measures that would be deleted under Option 3: Articles 19, 20, 21, 21 *bis*, 23, and 29(2)(c), and also refers in words to estimates and statistics returns. These references would all need to be deleted from Article 2 for the purposes of this option.

Article 27(2) currently requires Parties to furnish separate estimates and statistical information in respect of any permitted use of coca leaves for the preparation of flavouring agents (as allowed under Article 27(2)), and would therefore need to be deleted for the purposes of this option.

## Chapter 8. Conclusion

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IN THE LAST half-century, a number of countries have moved in the direction of decriminalising personal use and possession of drugs, but, as noted in Chapter 2, many of these moves have been compromised by attempts to stay within the present conventions. The compromises often involve retaining some lesser penalties or giving wide discretion to police, and often result in “net-widening” rather than a true decriminalisation. Operating under a changed set of international conventions would eliminate these problems.

There are no precedents in the last half-century for a fully regulated and legally supplied nonmedical market for the controlled substances. To reach this aim, it is clear that the Conventions must be changed either incrementally or more radically. A more thoroughgoing approach, which requires action by a group of countries, would be to adopt revisions to the Conventions, most likely by adopting new conventions intended to supersede the existing ones for countries adopting the new convention(s). The draft revisions in Chapter 5 above offer concrete language for incremental change in the Conventions, either by amendment or by pre-emption by a new convention. Chapter 7 extends these reforms by putting the drugs covered by the 1961 and the 1971 treaties under the same degree of international control. Chapter 6 lays out a more incremental approach which can be taken either by a country acting individually, or by like-minded countries acting in parallel. Its more incremental approach of “reform by subtraction” involves denouncing one or more of the treaties, and re-acceding with reservations.

A more far-reaching step would be to adopt a new Single Convention on Psychoactive Substances that would bring alcohol and tobacco within the global drug regime’s scope, and replace the present international treaties. Chapter 4 makes a beginning on the task of specifying what the aims and content of such a new Convention should be. Those undertaking such a new convention would have a more manageable task if there were detailed prior discussions of a variety of issues which such an enterprise would raise.

Few would argue that the system as we know it is succeeding in terms of its substantive aims; it is accordingly time for the concrete consideration of what an alternative international system would be. The aim of this book, at a minimum, has been to envisage concrete alternatives to the present system. More ambitiously, the aim has been to offer guideposts for plausible paths of change in moving beyond the current international system of drug control.

## APPENDIX

DETAILED COMMENTARY ON AMENDMENTS  
TO ALLOW POSSESSION AND USE  
OR TO ALLOW REGULATED DOMESTIC MARKETS



# Appendix

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## 1. THE PURPOSES AND APPROACHES OF THE THREE CONVENTIONS

### 1.1 The 1961 Convention as amended by the 1972 Protocol

THE 1961 CONVENTION was developed to unify and expand upon previous international agreements on narcotic drugs, with the aim of limiting use of, and international and domestic markets in, narcotic drugs to medical and scientific purposes. It imposes obligations on Parties to limit the production, manufacture, export, import, distribution of, trade in, use and possession of specified narcotic drugs exclusively to medical and scientific purposes (subject to some limited exceptions), to apply a range of control measures to these activities, and to penalise actions with respect to narcotic drugs that are contrary to the provisions of the Convention.

The 1961 Convention also established the International Narcotics Control Board (INCB). This body is responsible for monitoring the implementation of the Convention and illicit traffic in narcotic drugs. It adopted the system of requiring Parties to estimate drug requirements from the 1936 Geneva Convention. (The INCB is discussed below in section 4.5).

The 1961 Convention divides drugs into four schedules:

- Schedule I: drugs which are subject to all control measures in the Convention, including some drugs used for medical purposes (e.g. cannabis, cocaine, heroin, morphine and methadone);
- Schedule II: drugs used for medical purposes that are subject to a lower degree of control (e.g. codeine);
- Schedule III: pharmaceutical preparations made from substances without risks of abuse or ill-effects that are exempt from certain measures;
- Schedule IV: Schedule I drugs with particularly dangerous properties, to which Parties may apply special control measures in addition to those generally applicable to Schedule I drugs.

Article 4(c) of the Convention establishes the general obligation of Parties to limit the production, manufacture, export, import, distribution of, trade in, use and possession of narcotic drugs exclusively to medical and scientific purposes.

Article 19 of the Convention requires Parties to furnish annual estimates of the drugs that each of its territories will produce, manufacture, use, consume and hold in or add to stocks for medical and scientific purposes in the next year. Article 20 requires Parties to furnish annual statistical returns on each territory's actual production, manufacture, use, consumption, imports, exports, seizures, disposals, and stocks of drugs.



Articles 21–34 of the Convention impose obligations on Parties to apply control measures to licit activities with respect to drugs. These include: limiting manufacture and import of drugs to Parties' requirements, specific licensing or authorisation of the production and manufacture of drugs, trade and distribution in drugs in domestic markets, and import and export of drugs; requiring medical prescriptions for individual users of drugs; and not permitting the possession of drugs without legal authority.

Article 36 of the Convention requires Parties to make illicit drug activities punishable offences.

The 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961 ('1972 Protocol') did not make substantial changes to Parties' obligations under the 1961 Convention, but made greater provision for treatment, rehabilitation and preventive measures, strengthened the INCB's monitoring and enforcement powers, and other provisions relating to enforcement and extradition, and adjusted provisions relating to the estimates system and data collection.<sup>93</sup> As of 1 November 2009, only two states that are Parties to the 1961 Convention – Afghanistan and Chad – had not acceded to the 1972 Protocol and therefore remain Parties only to the 1961 Convention in its unamended form.<sup>94</sup>

## 1.2 The 1971 Convention

The 1971 Convention was established to expand the international drug control regime to psychotropic substances, in response to international concern about the increased use and harmful effects of these substances in the 1960s.

The 1971 Convention imposes similar controls and obligations on Parties with respect to psychotropic substances as the 1961 Convention imposes with respect to narcotic drugs.

As with the 1961 Convention, the 1971 Convention classifies drugs into four schedules, based on their properties with respect to risks of dependence and abuse, and therapeutic benefit.<sup>95</sup> All use of psychotropic substances in Schedule I of the Convention must be prohibited except for scientific and very limited medical purposes, and the manufacture, export, import, distribution, use and possession of substances in Schedules II, III and IV must be limited to medical and scientific purposes, subject to some limited exceptions (e.g. use for industrial purposes, possession of small quantities by international travellers, and use for the capture of animals). Licit manufacture, trade and distribution of substances in all four schedules must be licensed by governments, and subject to a number of other control measures, and supply and dispensation of Schedule II, III and IV substances to individuals must be under medical prescription.

<sup>93</sup> Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 48.

<sup>94</sup> INCB. *Report of the International Narcotics Control Board for 2009*. New York: United Nations, 2009. <http://www.incb.org/incb/en/annual-report-2009.html> (accessed 8 July, 2012)

<sup>95</sup> Article 2 of the 1971 Convention.

The penal provisions of Article 22 of the 1971 Convention are similar to those of Article 36 of the 1961 Convention.

### 1.3 The 1988 Convention

The 1988 Convention was developed to deal with the growth in illicit drug trafficking in the 1970s and 1980s, and to overcome the perceived inadequacies of earlier treaties in preventing production, trafficking and supply of illicit drugs. It was intended to deal comprehensively with international and domestic illicit traffic in narcotic drugs and psychotropic substances, and to provide for greater multilateral action and inter-governmental cooperation to suppress the illicit traffic.

The provisions of the 1988 Convention deal mainly with drug supply and related acts. Article 3 establishes a range of actions with respect to supply of and demand for narcotic drugs and psychotropic substances that Parties must make criminal offences by reference to earlier conventions, including an explicit obligation in Article 3(2) to make possession, purchase or cultivation of these drugs or substances for personal consumption a criminal offence.<sup>96</sup>

Most of the remainder of the provisions relate to cooperation between Parties in suppressing commission of these offences – providing for measures of extra-territorial jurisdiction, extradition, mutual legal assistance, transfer of proceedings, international cooperation and assistance for transit states, asset seizure, money laundering and confiscation of proceeds from illicit trafficking.

## 2. APPROACH TO AMENDING THE CONVENTIONS IN OPTION 1

The proposed approach to amending the Conventions under this option is for a new provision to be included in each of the 1961 Convention and the 1971 Conventions. This would exempt from the scope of those Conventions, and thereby from the scope of the 1988 Convention, any action with respect to drugs involving only a small quantity of drugs and undertaken for a non-commercial purpose, including cultivation, manufacture, production, preparation, offering, supply, distribution, purchase, acquisition, importation, exportation, possession or use of drugs. An action would be considered to be for a non-commercial purpose if it was not taken for the purpose of receiving direct or indirect pecuniary benefit.

In the 1961 Convention the following new provision should be added as Article 3 *bis*.

### ARTICLE 3 *BIS*

**Other than article 30(2)(b), this Convention does not apply to the cultivation, production, manufacture, extraction, preparation, offering, distribution, delivery,**

<sup>96</sup> Article 3(2) of the 1988 Convention.

**dispatch, transport, supply, purchase, acquisition, import, export, possession or use of drugs, or any similar or related action with respect to drugs, where such action involves only a small quantity of drugs and is for a non-commercial purpose.**

In the 1971 Convention, a new provision should be added as Article 2 *bis* in the same terms as the new provision in the 1961 Convention, but substituting 'Article 7(a) and Article 9' for 'Article 30(2)(b)', and 'psychotropic substances' for 'drugs'.

#### ARTICLE 2 BIS

**Other than article 7(a) and article 9, this Convention does not apply to the cultivation, production, manufacture, extraction, preparation, offering, distribution, delivery, dispatch, transport, supply, purchase, acquisition, import, export, possession or use of psychotropic substances where such action involves only a small quantity of psychotropic substances and is for a non-commercial purpose.**

The following definition of 'Non-commercial purpose' should be added as Article 1(1)(o) *bis* of the 1961 Convention, and as Article 1(c) *bis* of the 1971 Convention.

**"Non-commercial purpose" means a purpose other than to receive pecuniary benefit.**

The non-commercial purpose definition would mean that the Conventions would continue to apply to any form of participation in the commercial drug market – any step in creating drugs intended for sale, transporting drugs intended for sale (whether within or between States or territories), moving drugs intended for sale along the supply chain, offering to sell drugs, selling drugs, or purchasing drugs for re-sale, provided that the actor took the action for the purpose of receiving pecuniary benefit for or in relation to doing so.

Excluding non-commercial actions related to small quantities of drugs would free Parties from obligations under the Conventions to prohibit, prevent or control actions taken solely for the purpose of the actor's personal use of drugs, or the supply of a small quantity of drugs to others for their personal use, where this is other than for the purpose of receiving pecuniary benefit. This would include: cultivation, production, manufacture, acquisition, import, export, purchase and possession of drugs for the purposes of the actor's personal use of drugs. It would also allow cultivation, manufacture, production, acquisition, purchase, import, export and distribution of small quantities of drugs for the purpose of allowing others to consume drugs without intending to receive pecuniary benefit (for example, sharing drugs among friends for their personal use).

It would be left to the Parties to determine what constituted a ‘small quantity’ of particular drugs or psychotropic substances for the purposes of their domestic legislation. The aim in this and the ‘non-commercial purpose’ provisos would be to ensure that Parties were still obligated to prohibit the supply of large quantities of drugs, even where supply was for a non-commercial purpose, for example, free supply of drugs to a large number of people at parties.

The exemptions of Article 30(2)(b) from the new Article 3 *bis* of the 1961 Convention, and Article 9 from the new Article 2 *bis* of the 1971 Convention, would ensure that the requirements for supply or dispensation of drugs to individuals by medical prescription in those articles would continue to apply in relation to non-commercial supply or dispensation of small quantities of drugs for medical use. (This is discussed below in section 4.14 in relation to Article 30(2)(b) of the 1961 Convention and in section 5.4 in relation to Article 9 of the 1971 Convention.) Similarly, the exemption of Article 7 from the new Article 2 *bis* of the 1971 Convention would be needed to ensure that the control measures in that provision applying to Schedule I psychotropic substances would continue to apply to medical and scientific use of the substances and related actions, irrespective of the quantity of substances involved or the commerciality of the actions. This is discussed below in relation to Article 7.

Parties’ obligations under the 1988 Convention are defined by reference to the 1961 Convention,<sup>97</sup> the 1961 Convention as amended and the 1971 Convention. Therefore, removing small-scale, non-commercial actions from the scope of the 1961 Convention as amended and the 1971 Convention would have the same substantive effect on Parties’ obligations under the 1988 Convention, without any need for a similar general restriction of the scope of that Convention. (This is discussed further below in section 6.1.)

Some specific amendments to the text of provisions of the Conventions are also proposed. The aim of these amendments would be to avoid uncertainty in provisions applying to personal use that would be made redundant (entirely or partly) by the new provisions, or that would be inconsistent with the purposes of Option 1.

The main advantage of this proposed approach to amending the Conventions for Option 1 is that it would be straightforward, and would minimise the number and extent of textual amendments needed. The effect of the proposed approach would be that non-commercial actions with respect to small quantities of narcotic drugs and psychotropic substances would sit outside the Conventions. Parties could still elect to prohibit these actions but would not be obligated to do so under the Conventions. The approach would limit Parties’ obligations under the Conventions concerning drug control to

<sup>97</sup> As noted above, only only Afghanistan and Chad had not acceded to the 1972 Protocol to the 1961 Convention by November 2009. Parties’ obligations to the 1988 Convention must be interpreted by reference to the 1961 Convention, the 1961 Convention as amended, and the 1971 Convention, whether or not a Party to the 1988 Convention is a Party to the earlier conventions (see further discussion of this point below).

actions involving commercial quantities of narcotic drugs and psychotropic substances and actions undertaken for a commercial purpose. It would also limit the application of other provisions of the Conventions to such actions, such as those related to the functions and powers of the INCB.

### 3. APPROACH TO AMENDING THE CONVENTIONS IN OPTION 2

This option directly amends the provisions of the Conventions that impose obligations on Parties to limit actions with respect to drugs to medical or scientific purposes (Article 4(c) of the 1961 Convention, and Articles 5 and 7 of the 1971 Convention), and that provide for this as a function of the INCB (Articles 9(4) and 12(5) of the 1961 Convention). The proposed amendments would remove such requirements, and change this function of the INCB to one of monitoring domestic actions with respect to drugs for medical and scientific, and for other purposes, and preventing illicit international trade in drugs.

Article 36 of the 1961 Convention, Article 22 of the 1971 Convention and Article 3 of the 1988 Convention require Parties to penalise or criminalise actions only where they are contrary to laws or regulations that Parties are required to adopt under the Conventions. Therefore, the effect of these proposed amendments would also be to free Parties from their obligations to make punishable or criminal offences of domestic activities with respect to drugs in nonmedical and nonscientific use. (However, Parties would still be required to penalise or criminalise non-compliance with remaining control measures in the Conventions.) Direct amendments of Article 36 of the 1961 Convention and Article 3(1) of the 1988 Convention are nevertheless proposed to clarify the application of those provisions, based on the drafting approach used in Article 22 of the 1971 Convention.

Direct amendments of Articles 19 and 20 of the 1961 Convention and Article 16(4) of the 1971 Convention are also proposed to require Parties to furnish estimates of, and statistical returns on, drug production, manufacture, use and consumption in their countries and territories for non-medical/non-scientific purposes. This would be in addition to reporting on drug use for medical/scientific purposes. Similarly, direct amendments of Article 21 of the 1961 Convention are also proposed to require Parties to prevent manufacture and import of drugs beyond the total quantity of drugs used and consumed, both for non-medical/non-scientific and medical/scientific purposes.

Under Option 2, as under Option 1, it is also proposed that a new Article 3 *bis* and Article 2 *bis* be added to the 1961 Convention and the 1971 Convention (respectively) to exempt non-commercial actions involving small quantities of drugs from the provisions of those Conventions. The proposed definition of 'non-commercial purpose' would be added as Article 1(1)(o) *bis* of the 1961 Convention, and as Article 1(c) *bis* of the 1971 Convention, as discussed in relation to Option 1 above. The amendments to the provisions of the Conventions proposed under Option 2 would relieve Parties from obligations to prohibit and penalise or criminalise actions involving small quantities of drugs for use other than medical or scientific, so long as it was for non-commercial purposes. This would not require the addition of the new articles, as the proposed

amendments would allow all non-medical/non-scientific domestic markets in drugs to be legalised. The aim of the new articles would be to relieve Parties from obligations to apply the control measures in the Conventions (in Articles 23, 26, 28,29 and 30 of the 1961 Convention, and Articles 7 and 8 of the 1971 Convention) to non-commercial actions involving only small quantities of drugs.

Under Option 2, the new Article 3 *bis* of the 1961 Convention and the new Article 2 *bis* of the 1971 Convention would not need to refer to all the actions listed in the new Articles 3 *bis* and 2 *bis* under Option 1. This is because it is proposed instead that Article 3(1) of the 1988 Convention should be amended to refer to any action contrary to a law or regulation adopted in pursuance of obligations under the 1961 and 1971 Conventions.<sup>98</sup> It is also proposed that Article 36(1) of the 1961 Convention<sup>99</sup> should be similarly amended to refer generally to any action contrary to a law or regulation adopted in pursuance of its obligations under the Convention. (These provisions and the proposed amendments are discussed in more detail in sections 4.17 and 6.1 below.)

The proposed amendments would remove a number of actions that are currently specified in Article 3(1) of the 1988 Convention and Article 36(1) of the 1961 Convention that are not referred to in any other provisions of the 1961, 1971 or 1988 Conventions. These include: 'extraction', 'preparation', 'offering', 'delivery on any terms whatsoever', 'dispatch' and 'transport'. These actions would be considered to be involved in cultivation, production, manufacture, distribution, supply or acquisition of drugs, all of which would be listed in the new Articles 3 *bis* and 2 *bis*. In addition, the new Articles 3 *bis* and 2 *bis* would refer generally to 'any similar or related action with respect to drugs', including all the actions set out above. Therefore, for the purposes of Option 2, there would be no need to specifically list these actions in the new Articles 3 *bis* or 2 *bis*.

In the 1961 Convention the following new provision should be added as Article 3 *bis*:

#### ARTICLE 3 BIS

**Other than article 30(2)(b), this Convention does not apply to the cultivation, production, manufacture, distribution, supply, purchase, acquisition, import, export, possession or use of drugs, or any similar or related action with respect to drugs where such action involves only a small quantity of drugs and is for a non-commercial purpose.**

<sup>98</sup> Article 3(1) of the 1988 Convention requires Parties to make actions specified in that provision punishable offences where they are contrary to the provisions of the 1961 Convention and the 1971 Convention (i.e. to laws or regulations that must be adopted to fulfill obligations under the Convention).

<sup>99</sup> This section requires Parties to make actions specified in that provision punishable offences where they are contrary to laws or regulations that must be adopted under the 1961 Convention.

In the 1971 Convention the following new provision should be added as Article 2 *bis*;

#### ARTICLE 2 BIS

**Other than article 7(a) and article 9, this Convention does not apply to the cultivation, production, manufacture, distribution, supply, purchase, acquisition, import, export, possession or use of psychotropic substances, or any similar or related action with respect to psychotropic substances where such action involves only a small quantity of psychotropic substances and is for a non-commercial purpose.**

The same definition of 'Non-commercial purpose' should be added as Article 1(1)(o) *bis* of the 1961 Convention, and as Article 1(c) *bis* of the 1971 Convention, as under Option 1.

Also as under Option 1, Article 30(2)(b) of the 1961 Convention, and Articles 7(a) and 9 of the 1971 Convention, would not be subject to the general exemptions in the new Articles 3 *bis* and 2 *bis* (respectively). This would be to ensure that medical prescription requirements, and the control measures applicable to medical and scientific use of Schedule I psychotropic substances, would continue to apply to small quantities of drugs or substances for non-commercial medical use.

#### 4. CHANGES TO THE 1961 CONVENTION – OPTIONS 1 AND 2

The proposed changes under both Options 1 and 2 to add Article 1 (1)(o) *bis*, and Article 3 *bis*, are discussed above.

##### 4.1 Preamble to the 1961 Convention

#### PREAMBLE [EXISTING TEXT]

The Parties

...

Desiring to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use, and providing for continuous international co-operation and control for the achievement of such aims and objectives,

Hereby agree as follows:

#### 4.1.1 General comments on the preamble

The preamble of a treaty does not in itself have binding force. However, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, the preamble is part of the context for the purpose of interpreting a treaty.

The final paragraph of the Preamble of the 1961 Convention sets out as a major purpose of the Convention 'limiting [narcotic drugs] to medical and scientific use'. Although this, in itself, does not impose any direct obligation on Parties to limit narcotic drugs to medical and scientific use, the provisions of the Convention would be interpreted in light of this purpose, which is contrary to the aims of Option 1 and Option 2.

Therefore, for both options, it is suggested that this paragraph of the preamble be amended to remove the reference to limiting narcotic drugs to medical and scientific use.

#### 4.1.2 Option 1 – changes to the preamble

For Option 1, the reference to limiting narcotic drugs to medical and scientific use should be replaced with a reference to ensuring the availability of such drugs for medical and scientific use, which would be consistent with the recognition in the second paragraph of the preamble that 'adequate provision must be made to ensure the availability of narcotic drugs for [medical] purposes'.

Since preventing illicit traffic in drugs (i.e. supply of drugs commercially, or in more than a small quantity) would continue to be a major aim of the Convention under Option 1, it is suggested that a statement to this effect should also be included in the preamble to replace the reference to limiting drugs to medical and scientific use. 'Illicit traffic' is defined in Article 1(l) of the Convention as 'cultivation or trafficking in drugs contrary to the provisions of this Convention'. The United Nations Commentary on the 1961 Convention<sup>100</sup> ('1961 Commentary') explains that the term 'trafficking' includes all forms of trade and distribution in drugs, as well as manufacture and production of drugs. The effect of the new Article 3 *bis* would be that non-commercial actions involving small quantities of drugs would no longer be contrary to the provisions of the Convention, and consequently no longer be 'illicit'. However, Parties would still be obliged to limit commercial actions and actions involving more than small quantities of drugs to medical or scientific purposes. Therefore, the inclusion in the preamble of a reference to preventing 'illicit traffic' would indicate that an aim of the Convention would be to prevent any commercial trade in, distribution, cultivation, production or manufacture of drugs for other than medical or scientific purposes, where this involves more than a small quantity of drugs.

<sup>100</sup> United Nations. Commentary on the Single Convention on Narcotic Drugs 1961. New York: United Nations, 1973 ('1961 Commentary').



#### 4.1.3 Option 2 – changes to Preamble

Under Option 2, Parties would be free to permit regulated non-medical and non-scientific use of narcotic drugs. Therefore, as under Option 1, the reference in the Preamble to limiting narcotic drugs to medical and scientific use should also be replaced with a reference to ensuring the availability of such drugs for medical and scientific use. As under Option 1, it is proposed that a reference to preventing illicit traffic should be inserted in the preamble to indicate that an aim of the Convention would continue to be to prevent international and domestic traffic in drugs in breach of applicable control measures, and to prevent export of drugs to countries which do not have legal domestic markets.

#### 4.1.4 Amendment of Preamble under Option 1 or 2

Under both Option 1 and Option 2, the following amendments should be made to the preamble:

1. In the paragraph of the preamble beginning 'Desiring', for 'limiting such drugs to', substitute 'ensuring the availability of such drugs for'.
2. After 'medical and scientific use,', insert 'preventing illicit traffic in such drugs,'.

PREAMBLE
The Parties
...
Desiring to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, <del>limiting such drugs to</del> <b>ensuring the availability of such drugs for medical and scientific use, preventing illicit traffic in such drugs,</b> and providing for continuous international co-operation and control for the achievement of such aims and objectives,
Hereby agree as follows:'

#### 4.2 Article 1(1)(x) – definition of stocks

ARTICLE 1(1) [EXISTING TEXT]
x) "Stocks" means the amounts of drugs held in a country or territory and intended for:
i) Consumption in the country or territory for medical and scientific purposes;
ii) Utilisation in the country or territory for the manufacture of drugs and other substances, or

iii) Export;

but does not include the amounts of drugs held in the country or territory,

iv) By retail pharmacists or other authorised retail distributors and by institutions or qualified persons in the duly authorised exercise of therapeutic or scientific functions, or

v) As “special stocks”.

#### 4.2.1 General comments on Article 1(1)(x)

The definition of ‘stocks’ in Article 1(1)(x) is intended to capture stocks of drugs held in reserve by manufacturers and wholesalers. It expressly excludes stocks of drugs held by retailers.<sup>101</sup> The term ‘stocks’ or ‘stock’ is used in Article 19 (imposing obligations on Parties to provide estimates of drug requirements), Article 20 (requiring Parties to provide statistical returns of drug consumption and use) and Article 21 (imposing limits on manufacture and import of drugs). Under Articles 19 and 20, Parties must provide annual estimates and statistical returns in relation to stocks of drugs expected to be held and actually held. Under Article 21, Parties must limit the quantities of each drug manufactured and imported by any country or territory to the quantity added to the stock for the purpose of bringing it up the level specified in the estimate, in addition to the quantities consumed, used, exported, and acquired for special purposes.

Under the definition of stocks in Article 1(1)(x), only drugs intended for consumption for medical and scientific purposes are included in stocks. According to the 1961 Commentary, the words ‘for medical and scientific purposes’ were apparently included in the definition to indicate that the obligations of Parties to provide statistical returns and estimates in relation to drug stocks apply only to stocks legally held. It did not apply to stocks held for illicit trade, which would not be known to governments.<sup>102</sup> The only stocks that could be legally held under the Convention for consumption for other than medical and scientific purposes were for quasi-medical use of opium, opium smoking, coca leaf chewing or non-medical use of cannabis, where these uses were temporarily permitted under Article 49. Parties which held such stocks were obliged to provide separate estimates and statistical information under Article 49(3)(b) and Articles 19 and 20, and these were not technically ‘stocks’ according to the definition in Article 1(1)(x), because they were intended for other than medical or scientific consumption.<sup>103</sup> Similarly, under Article 27 and Articles 19 and 20, Parties are required to furnish

<sup>101</sup> 1961 Commentary, p. 31, footnote 1, and p. 32.

<sup>102</sup> 1961 Commentary, p. 34.

<sup>103</sup> 1961 Commentary, pp. 34–35.

separate estimates and statistical returns in relation to stocks of coca leaves to be used for the preparation of flavouring agents, as permitted under Article 27.

#### 4.2.2 Option 2 – changes to Article 1(1)(x)

As noted above, and discussed in further detail below, it is proposed under Option 2 that the requirements for countries and territories to furnish estimates and statistical returns of their drug use (in Articles 19 and 20 of the 1961 Convention) and to prevent manufacture and import beyond their requirements (in Article 21 of the 1961 Convention) should be extended to consumption of drugs for other than medical or scientific purposes. Accordingly, to ensure that Parties' obligations under these provisions in relation to stocks would apply to stocks held for consumption for other than medical and scientific purposes, the definition of stocks in Article 1(1)(x) would need to be amended to remove the limitation to stocks held for consumption for medical and scientific purposes. The reference to 'medical and scientific purposes' should be replaced with a reference to 'licit purposes' to make it clear that Parties would not be obliged to provide information in relation to stocks held for consumption for illicit trade. The changes proposed to Articles 19, 20 and 21 under Option 2 are discussed in more detail in sections 6.7, 6.8 and 6.9 below.

#### 4.2.3 Option 2 – amendment of Article 1(1)(x)

In Article 1(1)(x), for 'medical and scientific' substitute 'licit'.

- x) "Stocks" means the amounts of drugs held in a country or territory and intended for:
- i) Consumption in the country or territory for ~~medical and scientific~~ licit purposes;
  - ii) Utilisation in the country or territory for the manufacture of drugs and other substances, or
  - iii) Export;
- but does not include the amounts of drugs held in the country or territory,
- iv) By retail pharmacists or other authorised retail distributors and by institutions or qualified persons in the duly authorised exercise of therapeutic or scientific functions, or
  - v) As "special stocks".

### 4.3 Article 1(2) – definition of consumed

#### ARTICLE 1 [EXISTING TEXT]

2. For the purposes of this Convention a drug shall be regarded as “consumed” when it has been supplied to any person or enterprise for retail distribution, medical use or scientific research; and “consumption” shall be construed accordingly.

#### 4.3.1 General comments on Article 1(2)

Article 1(2) provides that ‘a drug shall be regarded as “consumed” when it has been supplied to any person or enterprise for retail distribution, medical use or scientific research, or as put by the 1961 Commentary, when drugs have been transferred ‘from the manufacturing or wholesale level of the drug economy to its retail level’.<sup>104</sup> This definition has application in Articles 19, 20 and 21 (discussed above and in more detail below). Under Articles 19 and 20, Parties must provide estimates and statistical returns in relation to drugs ‘consumed’, and under Article 21 Parties must limit the quantities of each drug manufactured and imported by any country or territory to the quantity ‘consumed’ for medical and scientific purposes, in addition to the quantities used, exported, added to the stock and acquired for special purposes.

#### 4.3.2 Option 2 – changes to Article 1(2)

Currently the definition of ‘consumed’ in Article 1(2) includes supply to any person or enterprise for retail distribution, which would cover supply for retail in non-medical and non-scientific markets without needing to be amended. However, the definition does not provide for the supply of drugs to persons for their personal (non-medical and non-scientific) use. As noted above, and discussed in further detail below, it is proposed under Option 2 that the requirements for countries and territories to furnish estimates and statistical returns, and to prevent manufacture and import beyond their requirements (under Articles 19, 20 and 21 respectively) would be extended to use of drugs other than for medical or scientific purposes, including personal use. To ensure that references to quantities of drugs ‘consumed’ in Articles 19, 20 and 21 captures quantities supplied for the personal use of the recipient, the definition of ‘consumed’ in Article 1(2) would need to be amended to include a reference to drugs supplied to any person for ‘personal use’. (The changes proposed to Articles 19, 20 and 21 under Option 2 are discussed in more detail in sections 6.7, 6.8 and 6.9 below.)

#### 4.3.3 Option 2 – amendment of Article 1(2)

The following amendment should be made to Article 1(2):

<sup>104</sup> 1961 Commentary, p. 223.

After 'scientific research', insert ', or personal use'.

2. For the purposes of this Convention a drug shall be regarded as “consumed” when it has been supplied to any person or enterprise for retail distribution, medical use or scientific research, **or personal use**; and “consumption” shall be construed accordingly.

#### 4.4 Article 4(c) – general obligations of Parties

##### ARTICLE 4 [EXISTING TEXT]

###### General Obligations

The parties shall take such legislative and administrative measures as may be necessary:

...

(c) subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

##### 4.4.1 General comments on Article 4(c)

Article 4(c) of the 1961 Convention provides that a general obligation of Parties is to limit international and domestic markets in drugs, and use and possession of drugs, to medical and scientific purposes. Article 4(c) requires Parties to take necessary legislative and administrative measures to limit exclusively to medical and scientific purposes the creation of drugs through production and manufacture, the import and export of drugs, the distribution of and trade in drugs, and the use and possession of drugs.

'Medical purposes' is not defined in the Convention and does not have a clear or fixed meaning. The preamble to the Convention indicates that medical purposes include purposes intended to relieve pain and suffering (recognising that 'the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering'). The 1961 Commentary noted in 1973 that 'medical purposes' had been interpreted in different ways by Governments, including in some cases the alleviation of symptoms of withdrawal for drugs, and acknowledged that its meaning may vary according to developments in medical science.<sup>105</sup>

<sup>105</sup> United Nations. Commentary on the Single Convention on Narcotic Drugs, 1961. New York: United Nations, 1973 ('1961 Commentary'), p. 111.

'Production' of drugs is defined in Article 1(1)(t) as 'the separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained'. It is intended to capture agricultural operations rather than industrial processes involved in manufacturing drugs.<sup>106</sup> 'Manufacture' is defined in Article 1(1)(n) as 'all processes, other than production, by which drugs may be obtained [including] refining as well as the transformation of other drugs'. The 1961 Commentary suggests that the limitation of manufacture to medical and scientific purposes in Article 4(c) relates only to manufacture *of* drugs (defined in Article 1(1)(j) as any substance in Schedule 1 and II of the Convention), and not to the manufacture *from* drugs of substances not covered by the Convention.<sup>107</sup>

'Import' and 'export' are defined in Article 1(1)(m) as 'in their respective connotations, the physical transfer of drugs from one State to another State, or from one territory to another territory of the same State'. 'Distribution' is not defined in the Convention. Its ordinary meaning is 'the act of sharing something out among a number of recipients'.<sup>108</sup> The UN Commentary on the 1988 Convention<sup>109</sup> ('1988 Commentary') notes this ordinary meaning but suggests that a more apt interpretation of distribution (as used in the provisions of the 1988 Convention dealing with criminalisation of participation in context of illicit traffic in drugs) may be by reference to 'distributorship' – the commercial role of ensuring that goods pass from manufacturer or importer to wholesaler or retailers, or in other words, the movement of goods through the supply chain.<sup>110</sup>

According to the 1961 Commentary, it is clear that 'possession' in Article 4(c) includes possession for the purpose of personal use of drugs, as well as possession for commercial distribution, and therefore that Parties are generally obliged under Article 4(c) to limit both kinds of possession to medical and scientific purposes (although it is not clear whether possession for non-medical and non-scientific personal use must be made a punishable offence under the penal provisions of Article 36, as discussed in relation to Article 36 below).

'Use' is not defined in the Convention, but its meaning in Article 4(c) would clearly include consumption of drugs by individuals. It is unclear whether it would also extend to use of drugs to manufacture other drugs, substances or preparations, but it seems most likely that all the forms of conduct intended to be captured in this regard are covered under 'manufacture' in Article 4(c) – defined in Article 1(n) to include transforming a drug into another drug (which by virtue of Article 2, paragraphs 3 and 4,

<sup>106</sup> Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 79.

<sup>107</sup> 1961 Commentary, p. 16.

<sup>108</sup> *Oxford Dictionary of English*, Second Edition, revised. Oxford: Oxford University Press, 2009.

<sup>109</sup> United Nations. *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988. New York: United Nations, 1988 ('1988 Commentary').

<sup>110</sup> 1988 Commentary, p. 55.

would also include transforming a drug into a Schedule III preparation).<sup>111</sup> As noted above, the 1961 Commentary suggests that Article 4(c) does not apply to the manufacture of substances not covered by the Convention. In addition, Article 2(9) of the Convention provides that Parties are not required to apply the provisions of the Convention to drugs used in industry for non-medical and non-scientific purposes.<sup>112</sup>

Article 4(c) is expressed to be '[s]ubject to the provisions of this Convention'. Exceptions to the general obligation of Parties in Article 4(c) to limit drugs to medical and scientific purposes are provided in Article 2(9) (discussed above), Article 27 (permitting production, import, export, trade in, and possession and use of coca leaves for the preparation of a flavouring agent), and Article 49 (which allows Parties to reserve the right to temporarily permit non-medical and non-scientific use of certain drugs at the time of signature, ratification or accession to the Convention).

#### 4.4.2 Option 1 – changes to Article 4(c)

Article 4(c) imposes obligations on Parties to prevent non-medical and non-scientific use of drugs, as well as production, manufacture, distribution of, and possession of drugs, where these actions are undertaken for the purpose of non-medical and non-scientific use of drugs, whether for commercial purposes or otherwise, or involving small quantities of drugs or otherwise. Therefore, Article 4(c) would need to be amended or changed in effect to allow Parties to permit domestic actions relating to non-commercial use of small quantities of drugs.

The effect of the addition of a new provision, as described above, exempting non-commercial actions with respect to small quantities of drugs from the scope of the Convention, would be to confine the scope of Parties' general obligations under Article 4(c) to limiting *commercial* manufacture, distribution of, use and possession of drugs to medical and scientific purposes, or limiting non-commercial actions to medical and scientific purposes if they involve more than a small quantity of drugs. That is, Parties would only be obliged to limit these actions to medical and scientific purposes where they are undertaken for the purpose of receiving pecuniary benefit, or involved more than small quantities of drugs. They would not be obliged to prohibit or prevent these actions where they are undertaken solely for the purpose of personal use of small quantities of drugs (whether medical or non-medical).

<sup>111</sup> But note that Article 1, subparagraph (x)(ii), Article 2, paragraph 4, Article 19, subparagraph 1(b), Article 20, subparagraph 1(b), and Article 21, subparagraph 1(b) refer to the use or utilisation of drugs in manufacturing other drugs, substances or preparations. Note also that Article 9 provides that Parties are not required to apply the provisions of the 1961 Convention to drugs which are commonly used in industry for other than medical or scientific purposes.

<sup>112</sup> Provided that they ensure that drugs used in this way 'are not liable to be abused or have ill effects' and that 'the harmful substances cannot in practice be recovered' (i.e. that drugs cannot be recovered or restored from their industrial use for consumption), and that they include the amount of drugs used in industry in the statistical information they must provide under article 20.

Parties would be allowed to permit small-scale cultivation, manufacture, production, import and export of drugs for personal use, and import, export and distribution of small quantities of drugs for others' personal use. They would also be allowed to permit possession of drugs for personal use, and personal use itself, whether or not for medical purposes. The new provision would not affect Parties' obligation to limit 'trade in' drugs exclusively to medical and scientific purposes. Parties would not be allowed to permit any of these activities to be undertaken for pecuniary gain, unless for a medical or scientific purpose.

The proposed new Article 3 *bis* would limit the scope of Parties' obligations under Article 4(c) without any technical need for direct amendment of the provision, which is already subject to the provisions of the Convention. The new Article 3 *bis* would make it clear that non-commercial and small-scale actions with respect to drugs are entirely exempt from all the provisions of the Convention (other than Article 30(2)(b)).

However, since Article 4(c) sets out Parties' general obligations under the Convention, ideally these obligations should be clear from the text of that article, without the need to refer to other provisions. Accordingly, it is proposed that Article 4(c) should be amended to make it clear that its scope extends only to actions that involve more than a small quantity of drugs or that are undertaken for commercial purposes.

In addition, the reference to 'use' of drugs in Article 4(c) would effectively be made redundant by the new Article 3 *bis*. This is because, for the reasons discussed above, it is likely that Parties' obligation to limit 'use' of drugs to medical and scientific purposes would cover only personal consumption. Therefore, there would be no need to retain the word 'use' in Article 4(c), and to do so may give rise to uncertainty as to the effect of the new article. Accordingly, it is suggested that 'use' should be deleted from Article 4(c).

#### 4.4.3 Option 1 – amendment of Article 4(c)

The following amendments should be made to Article 4(c):

1. After 'medical and scientific purposes':
  - a) insert a colon
  - b) on a new line, insert '(i) trade in drugs; and'
  - c) on a new line, insert '(ii)'
2. Delete 'trade in, use'
3. After 'possession of drugs', insert ', unless in small quantities and for a non-commercial purpose'.

### ARTICLE 4. GENERAL OBLIGATIONS

The parties shall take such legislative and administrative measures as may be necessary:

...



(c) subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes:

**(i) trade in drugs; and**

**(ii) the production, manufacture, export, import, distribution of, ~~trade in, use~~ and possession of drugs, unless in small quantities and for a non-commercial purpose.**

#### 4.4.4 Option 2 – changes to Article 4(c)

Article 4(c) generally obliges Parties to limit international and domestic markets in drugs to medical and scientific purposes, and would therefore prevent Parties from permitting regulated non-medical and non-scientific markets in drugs under Option 2. Accordingly, Article 4(c) should be deleted under Option 2.

#### 4.4.5 Option 2 – amendment of Article 4(c)

Article 4(c) should be deleted.

### ~~ARTICLE 4. GENERAL OBLIGATIONS~~

~~The parties shall take such legislative and administrative measures as may be necessary:~~

~~...~~

~~(c) subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.~~

## 4.5 Article 9(4) – functions of the INCB

### ARTICLE 9 [EXISTING TEXT]

Composition and Functions of the Board

...

4. The Board, in co-operation with Governments, and subject to the terms of this Convention, shall endeavour to limit the cultivation, production, manufacture and use of drugs to an adequate amount required for medical and scientific purposes, to ensure their availability for such purposes and to prevent illicit cultivation, production and manufacture of, and illicit trafficking in and use of drugs.

#### 4.5.1 General comments on Article 9(4)

The International Narcotics Control Board (INCB) (referred to in the Conventions as the 'Board') is the 'independent and quasi-judicial' body responsible for monitoring implementation of the Conventions by signatories.<sup>113</sup> According to the INCB website, its functions include to:

- endeavour, in cooperation with Governments, to ensure the availability of adequate drugs for medical and scientific purposes
- prevent diversion of drugs from licit to illicit sources
- identify weaknesses in national and international drug control systems
- administer a system of estimates of countries' requirements for narcotic drugs (and a voluntary system for psychotropic drugs), and monitor licit drug activities through a statistical returns system
- monitor Governments' measures to prevent diversion of substances used in the illicit manufacture of narcotic drugs and psychotropic substances
- analyse information provided by Governments to ensure they are adequately carrying out the provisions of the Conventions, and recommend remedial measures
- maintain a permanent dialogue with Governments to assist them in complying with their Convention obligations.<sup>114</sup>

Article 9(4), inserted by the 1972 Protocol, confirmed the functions of the INCB as being to endeavour to achieve the general aims of the Convention – (1) to limit cultivation, production and manufacture of drugs to the amount required for medical and scientific purposes; (2) to ensure their availability for such purposes; and (3) to prevent illicit drug cultivation, production, manufacture and trafficking – as was already the INCB's practice. Article 9(4) supplements other provisions of the Convention which set out specific functions of the INCB, including to administer Parties' estimates of drug requirements and statistical returns under Articles 12, 13, 19 and 20, and to limit Parties' manufacture and import of drugs to amounts required for licit purposes under Article 21. Neither the 1971 Convention nor the 1988 Convention contains a provision corresponding to Article 9(4) of the 1961 Convention.

The Commentary on the 1961 Convention points out, however, that the INCB has no powers of direct administration in any country: the steps needed to implement the requirements of the Convention must be taken by the governments concerned, and the INCB must act in cooperation with governments.

However, Article 14 of the Convention gives the INCB powers to take certain measures if it has objective reasons to believe that the aims of the Convention are being 'seriously

<sup>113</sup> International Narcotics Control Board Mandate and Functions. Vienna: International Narcotics Control Board. <http://www.incb.org/incb/en/mandate.html>.

<sup>114</sup> See previous footnote.

endangered' by a Party's failure to carry out its provisions, or that a Party has become or is at serious risk of becoming 'an important centre of illicit cultivation, production or manufacture of, or traffic in or consumption of drugs' without any failure to implement the provisions of the Convention. In such circumstances, the INCB may propose the opening of confidential consultations or request the Party to provide explanations, and may then call upon the Party to take remedial measures necessary to execute provisions of the Convention, and may propose to a Party that it carry out a study in its territory. If the Party fails to give satisfactory explanations or to adopt required remedial measures, or there is 'a serious situation that needs cooperative action at the international level', then the INCB may call the attention of the Parties, the UN Economic and Social Council and the Commission on Narcotic Drugs to the matter, and may recommend that Parties stop the import or export of drugs to or from the Party concerned.

Substantially the same provisions are contained in Article 19 of the 1971 Convention, except that there is no provision for the INCB to take the steps described above if a Party has become, or is at serious risk of becoming, an important centre of illicit activity without any failure to implement provisions of the Convention. Article 22 of the 1988 Convention also contains similar provisions. Article 22 empowers the INCB to invite a Party to furnish relevant information if it has reasons to believe that the aims of the Convention are not being met. In relation to Articles 12, 13 and 16 (which deal respectively with: diversion of substances for illicit manufacture; trade in and diversion of materials and equipment for illicit production or manufacture; and documentation of exports), Article 22 empowers the INCB to require a Party to adopt remedial measures to execute those provisions, and to call the attention of the Parties, the UN Economic and Social Council and the Commission on Narcotic Drugs to the matter if the Party fails to do so.

Article 15 of the 1961 Convention (mirrored in Article 18 of the 1971 Convention and Article 23 of the 1988 Convention) also requires the INCB to report annually on its work (and additionally as it considers necessary). This includes providing an analysis of the estimates and statistical information provided to it, an account of any explanations provided by Parties, and any observations and recommendations it wishes to make. In practice, the INCB's annual reports provide an overview of the implementation and effectiveness of the international drug control system.<sup>115</sup> The INCB reports on the outcomes of its reviews of Parties' compliance with the Conventions and the adequacy of Parties' drug control legislation and policy. It calls upon Parties to adopt measures to ensure compliance with the Conventions and to prevent illicit trafficking and diversion.<sup>116</sup>

<sup>115</sup> Boister, N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 483.

<sup>116</sup> See for example: INCB, *Report of the International Narcotics Control Board for 2009*. New York: United Nations, 2009.

#### 4.5.2 Option 1 – changes to Article 9(4)

Article 9(4) does not give the INCB any direct powers to limit non-medical and non-scientific cultivation, production, manufacture and use of drugs within the territories of countries, but it provides for the INCB to endeavour to do this in cooperation with Parties. This would be counter to allowing Parties to permit non-commercial domestic actions in relation to small quantities of drugs for other than medical or scientific purposes under Option 1. It would also be inconsistent with allowing Parties to permit non-medical and non-scientific domestic markets in drugs under Option 2. Therefore, the scope of the INCB's functions under Article 9(4) in relation to domestic drug control would need to be limited to commercial and/or larger than small-scale actions under Option 1. The nature of the INCB's functions under Article 9(4) would need to substantially change under Option 2.

The proposed new Article 3 *bis* would exempt non-commercial actions in relation to small quantities of drugs from the scope of the Convention. Since Article 9(4) is expressed to be 'subject to the terms of this Convention', the technical effect of the new article would be to confine the first of the INCB's functions set out in Article 9(4) – that is, limiting cultivation, production, manufacture and use of drugs to an amount required for medical and scientific purposes – only to the extent that these actions are undertaken commercially and/or involve more than a small quantity of drugs. In addition, the third of the INCB's functions under paragraph 4 is to prevent '*illicit* cultivation, production and manufacture of drugs, and illicit trafficking in and use of drugs'. The effect of the new provision would be that cultivation, production, manufacture of, and trade in, small quantities of drugs for non-commercial purposes would no longer be governed by the provisions of the Convention, and accordingly, would no longer be '*illicit*'. (The definition of '*illicit* traffic' in Article 1 of the Convention – '*cultivation or trafficking in drugs contrary to the provisions of this Convention*' – indicates that '*illicit*' is intended to mean contrary to the provisions of the Convention.) Therefore, technically, the INCB's functions under the Convention would no longer include endeavouring to prevent non-commercial actions in relation to small quantities of drugs, and there would be no need for direct amendment of Article 9(4) for the purposes of Option 1.

However, relying on the new provision alone may not sufficiently signal that the intention is to limit the INCB's functions in this way, and may not affect how the INCB operates in practice. A specific amendment to Article 9, paragraph 4 may be needed to make it clear that the INCB is no longer intended to have functions or powers to prevent or limit non-commercial actions in relation to drugs. Therefore, it is proposed that Article 9(4) should be amended directly to restrict the INCB's functions to endeavouring to limit *commercial* production, manufacture and use of drugs to an adequate amount required for medical and scientific purposes.

#### 4.5.3 Option 1 – amendment of Article 9(4)

In Article 9(4), after '*limit*', insert '*commercial*'.

## ARTICLE 9. COMPOSITION AND FUNCTIONS OF THE BOARD

4. The Board, in co-operation with Governments, and subject to the terms of this Convention, shall endeavour to limit the **commercial** cultivation, production, manufacture and use of drugs to an adequate amount required for medical and scientific purposes, to ensure their availability for such purposes and to prevent illicit cultivation, production and manufacture of, and illicit trafficking in and use of, drugs.

### 4.5.4 Option 2 – changes to Article 9(4)

The functions of the INCB would need to be changed such that it would no longer have any role in limiting the creation (cultivation, production, or manufacture), import, export, supply or use of drugs to medical and scientific purposes, because the purpose of Option 2 is to allow Parties to permit non-medical and non-scientific markets in drugs. The INCB would continue to have the function of endeavouring to prevent illicit international trade in drugs. However, 'illicit' international trade would no longer mean any non-medical and non-scientific import or export of drugs. Instead, it would become international import or export of drugs in breach of applicable control measures, or export of drugs for non-medical and non-scientific use to countries that do not have legal domestic non-medical/non-scientific markets.

Parties would be subject to obligations to apply the control measures in the Convention to the creation, supply and use of drugs for non-medical and non-scientific purposes, as well as for medical and scientific purposes, for example, controls on the production of opium, the cultivation of the opium poppy, coca bush and cannabis plant, and the manufacture of drugs. Accordingly, it seems reasonable that the INCB should have a role in monitoring non-medical and non-scientific domestic markets in drugs, and Parties' implementation of these control measures. This monitoring would be consistent with the INCB's continued role in administering the estimates system, and would allow it to assess Parties' adherence to their Convention obligations. It would also help the INCB to perform its function of endeavouring to prevent illicit international trade in drugs, by assisting it to prevent over-supply of drugs and diversion to illicit international markets.

As noted, the INCB would continue to be responsible for administering the estimates system, though the aim of this would become to ensure the availability of adequate quantities of drugs for medical and scientific purposes, and to monitor the cultivation, production, manufacture, use and distribution of drugs, rather than to limit the use and distribution of drugs to medical and scientific purposes.

To bring about this shift in functions of the INCB, Article 9(4) would need to be amended to remove the requirements for the INCB to endeavour to limit the cultivation, production, manufacture and use of drugs to an adequate amount required for medical and scientific purposes, and to prevent the illicit cultivation, production, manufacture

and use of drugs. These requirements should be replaced with a requirement for the INCB to *monitor* the cultivation, production, manufacture and use of drugs (whether for medical or non-medical purposes). The requirement for the INCB to prevent ‘illicit trafficking’ in drugs should be replaced with a narrower obligation to prevent illicit import and export of drugs.<sup>117</sup> The INCB’s aims in administering the estimates system under Article 12 should also be similarly changed, as discussed below.

#### 4.5.5 Option 2 – amendment of Article 9(4)

The following amendments should be made to Article 9(4):

1. For ‘limit’, substitute ‘monitor’
2. Delete ‘to an adequate amount required for medical and scientific purposes’
3. For ‘their’, substitute ‘the’
4. After ‘availability’, insert ‘of adequate quantities of drugs’
5. For ‘such’, substitute ‘medical and scientific’
6. For ‘cultivation, production and manufacture of, and illicit trafficking in and use of’, substitute ‘import and export of’.

#### ARTICLE 9. COMPOSITION AND FUNCTIONS OF THE BOARD

4. The Board, in co-operation with Governments, and subject to the terms of this Convention, shall endeavour to ~~limit~~ **monitor** the cultivation, production, manufacture and use of drugs ~~to an adequate amount required for medical and scientific purposes~~, to ensure ~~their~~ **the** availability of **adequate quantities of drugs** for ~~such~~ **medical and scientific** purposes and to prevent illicit ~~cultivation, production and manufacture of, and illicit trafficking in and use of,~~ **import and export** of drugs.

#### 4.6 Article 12 – administration of the estimate system by the INCB

##### ARTICLE 12 [EXISTING TEXT]

##### Administration of the Estimate System

1. The Board shall fix the date or dates by which, and the manner in which, the estimates as provided in article 19 shall be furnished and shall prescribe the forms therefore.

<sup>117</sup> ‘Illicit traffic’ is defined in article 1(l) of the Convention as ‘cultivation or trafficking in drugs contrary to the provisions of this Convention’. The 1961 Commentary states that ‘trafficking’ includes all forms of trade and distribution in drugs, as well as manufacture and production of drugs.

2. The Board shall, in respect of countries and territories to which this Convention does not apply, request the Governments concerned to furnish estimates in accordance with the provisions of this Convention.

3. If any State fails to furnish estimates in respect of any of its territories by the date specified, the Board shall, as far as possible, establish the estimates. The Board in establishing such estimates shall to the extent practicable do so in co-operation with the Government concerned.

4. The Board shall examine the estimates, including supplementary estimates, and, except as regards requirements for special purposes, may require such information as it considers necessary in respect of any country or territory on behalf of which an estimate has been furnished, in order to complete the estimate or to explain any statement contained therein.

5. The Board, with a view to limiting the use and distribution of drugs to an adequate amount required for medical and scientific purposes and to ensuring their availability for such purposes, shall as expeditiously as possible confirm the estimates, including supplementary estimates, or, with the consent of the Government concerned, may amend such estimates. In case of a disagreement between the Government and the Board, the latter shall have the right to establish, communicate, and publish its own estimates, including supplementary estimates.

6. In addition to the reports mentioned in article 15, the Board shall, at such times as it shall determine but at least annually, issue such information on the estimates as in its opinion will facilitate the carrying out of this Convention.

#### 4.6.1 General comments on Article 12

The 1961 Commentary, and the Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961<sup>118</sup> ('Commentary on the 1972 Protocol'), explain that the purposes of the estimate system are to limit the narcotics supplies of each country or territory to adequate quantities for medical and scientific use, the maintenance of adequate stocks (the quantities of drugs stocked in countries for medical and scientific use, manufacture of other drugs or substances, and export), and legitimate exports, and to ensure the availability of drugs for medical and scientific purposes.<sup>119</sup>

Therefore, the overall aims of the system are to prevent, as far as possible, the diversion of surplus quantities into illicit markets, and to ensure the availability of sufficient drugs to meet countries' and territories' medical and scientific needs. The estimate system achieves these aims: first, by requiring Parties to furnish annual estimates of the drugs

<sup>118</sup> United Nations. Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961. Geneva: United Nations, 1972 ('Commentary on the 1972 Protocol').

<sup>119</sup> 1961 Commentary, p. 157; Commentary on the 1971 Protocol, pp. 19–20.

that will be produced, manufactured, consumed, used and stored for medical and scientific purposes in each of its territories within the coming year; second, by requiring Parties to provide annual statistical reports on the quantities of drugs so produced, manufactured, consumed, used and stored in each of their territories; and third, by requiring these quantities to be within the relevant estimates, and any supplementary estimates, furnished by that country or territory (or established by the INCB where a country/territory fails to furnish estimates or the INCB disagrees with its estimates), and to not exceed the quantity of drugs manufactured and imported by that country or territory in that year. The quantity of drugs exported to any country must also be within the total of the estimates for that country or territory.

The estimate system is established under Articles 12, 19, 20, 21 and 31 of the 1961 Convention. The requirements for Parties to furnish estimates are set out in Article 19(1). This provision requires Parties to furnish to the INCB each year for each of their territories estimates of the quantities of drugs they will: a) consume for medical and scientific purposes; b) use for the manufacture of other drugs, preparations or substances; c) hold in stocks; or d) add to special stocks. They must also provide estimates of: the area and location of land on which opium poppy will be cultivated; the approximate quantity of opium that will be produced; the number of industrial establishments which will manufacture synthetic drugs; and the quantities of synthetic drugs the establishments will manufacture. Article 20 requires Parties to provide annual statistical returns in respect of each territory's actual production, manufacture, use, consumption, imports, exports, seizures, disposals, and stocks of drugs. Under Article 19(5) and Article 21(1), the quantities of drugs consumed, used, added to the stock and acquired for special purposes must be within the limits of the relevant estimates supplied by the Parties. Under Article 21(4), the quantity of drugs exported to any country or territory must not exceed the total of the estimates for that country or territory, or the Board may impose an embargo on further exports in that year to that country or territory. Additionally, under Article 31(1)(b), Parties are required to not knowingly permit the export of drugs to any country or territory except within the limits of the total of the estimates for that country or territory.

Article 12 imposes obligations on the INCB to administer the estimate system. It requires the INCB to: a) determine the procedure for furnishing estimates to the INCB (dates and forms); b) request estimates from countries and territories which are not parties to the Convention; c) establish estimates on behalf of a country or territory if it fails to furnish the estimates by the required dates or the INCB disagrees with its estimates; d) confirm or (with the consent of the Government concerned) amend the estimates with a view to limiting the use and distribution of drugs to the amount required for medical and scientific purposes and ensuring their availability for these purposes; and e) issue at least annual information on the estimates.

Paragraph 5 of Article 12 was amended by the 1972 Protocol to set out explicitly the purpose of the INCB's examination of the estimates – to limit the use and distribution of drugs to an adequate amount required for medical and scientific purposes and to ensure their availability for such purposes – as was already the INCB's practice, and to provide



for the right of the INCB to establish its own estimates if it disagrees with a Government's estimates.

#### 4.6.2 Option 2 – changes to Article 12(5)

In order to allow Parties to permit non-medical and non-scientific markets in drugs for the purposes of Option 2, the estimate system would need to be changed so that Parties would no longer be required to prevent supply of drugs beyond their medical and scientific needs (by limiting the quantities produced, manufactured, consumed, used and stored to the estimated quantities needed for medical and scientific purposes, or by ensuring that the quantity of drugs manufactured and imported by a country or territory was within that country or territory's total estimates of its needs for medical and scientific use and export).

The main aims of the estimate system should become to enable the INCB's monitoring of medical and scientific and non-medical and non-scientific markets in drugs, and to assist the INCB to ensure the adequate supply of drugs to countries or territories to meet their medical and scientific needs. To this end, it is proposed under Option 2 that the requirements in Articles 19 and 20 for Parties to furnish estimates and statistical returns, and the supply limits in Articles 19 and 21, should be extended to the consumption, production and manufacture of drugs for non-medical and non-scientific purposes. This is discussed further below in relation to Articles 19, 20 and 21.

Accordingly, the INCB's purposes in administering the estimate system as set out in Article 12(5) would need to be changed so that they no longer include limiting use and distribution of drugs to the amount needed for medical and scientific purposes. The major purposes of the INCB's administration of the system should instead become monitoring medical and scientific and non-medical and non-scientific markets in drugs, preventing over-supply of drugs for these markets, and ensuring the adequate supply of drugs in countries and territories for medical and scientific purposes.

#### 4.6.3 Option 2 – amendment of Article 12(5)

The following amendments should be made to Article 12(5):

1. For 'limiting', substitute 'monitoring'
2. After 'monitoring the', insert 'cultivation, production, manufacture,'
3. Delete 'to an adequate amount required for medical and scientific purposes'
4. For 'their', substitute 'the'
5. After 'availability', insert 'of adequate quantities of drugs'
6. For 'such', substitute 'medical and scientific'.

## ARTICLE 12. ADMINISTRATION OF THE ESTIMATE SYSTEM

5. The Board, with a view to ~~limiting~~ **monitoring** the **cultivation, production, manufacture**, use and distribution of drugs ~~to an adequate amount required for medical and scientific purposes~~ and to ensuring ~~their~~ **the** availability of **adequate quantities of drugs** for ~~such~~ **medical and scientific** purposes, shall as expeditiously as possible confirm the estimates, including supplementary estimates, or, with the consent of the Government concerned, may amend such estimates. In case of a disagreement between the Government and the Board, the latter shall have the right to establish, communicate, and publish its own estimates, including supplementary estimates.

### 4.7 Article 19 – estimates of drug requirements

#### ARTICLE 19 [EXISTING TEXT]

##### Estimates of Drug Requirements

1. The Parties shall furnish to the Board each year for each of the territories, in the manner and form prescribed by the Board, estimates on forms supplied by it in respect of the following matters:

- a) Quantities of drugs to be consumed for medical and scientific purposes;
- b) Quantities of drugs to be utilised for the manufacture of other drugs, or preparations in Schedule III, and of substances not covered by this Convention;
- c) Stocks of drugs to be held as at 31 December of the year to which the estimates relate;
- d) Quantities of drugs necessary for addition to special stocks;
- e) The area (in hectares) and the geographical location of land to be used for the cultivation of the opium poppy;
- f) Approximate quantity of opium to be produced;
- g) The number of industrial establishments which will manufacture synthetic drugs; and
- h) The quantities of synthetic drugs to be manufactured by each of the establishments referred to in the preceding subparagraph.

2. a) Subject to the deductions referred to in paragraph 3 of article 21, the total of the estimates for each territory and each drug except opium and synthetic drugs shall consist of the sum of the amounts specified under subparagraphs a), b) and d) of paragraph 1 of this article, with the addition of any amount required to bring the actual stocks on hand at 31 December of the preceding year to the level estimated as provided in subparagraph (c) of paragraph 1;

b) Subject to the deductions referred to in paragraph 3 of article 21 regarding imports and in paragraph 2 of article 21 *bis*, the total of the estimates for opium for each territory shall consist either of the sum of the amounts specified under subparagraphs (a), (b) and (d) of paragraph 1 of this article, with the addition of any amount required to bring the actual stocks on hand at 31 December of the preceding year to the level estimated as provided in subparagraph c) of paragraph 1, or of the amount specified under subparagraph f) of paragraph 1 of this article, whichever is higher.

c) Subject to the deductions referred to in paragraph 3 of article 21, the total of the estimates for each territory for each synthetic drug shall consist either of the sum of the amounts specified under subparagraphs a), b) and d) of paragraph 1 of this article, with the addition of any amount required to bring the actual stocks on hand at 31 December of the preceding year to the level estimated as provided in subparagraph c) of paragraph 1, or of the sum of the amounts specified under subparagraph h) of paragraph 1 of this article, whichever is higher.

d) The estimates furnished under the preceding subparagraphs of this paragraph shall be appropriately modified to take into account any quantity seized and thereafter released for licit use as well as any quantity taken from special stocks for the requirements of the civilian population.

3. Any State may during the year furnish supplementary estimates with an explanation of the circumstances necessitating such estimates;

...

5. Subject to the deductions referred to in paragraph 3 of article 21, and account being taken of where appropriate of the provisions of article 21 *bis*, the estimates shall not be exceeded.

#### 4.7.1 General comments on Article 19

The aims of the estimate system are discussed above.

Article 19 of the 1961 Convention sets out the specific estimates which Parties must provide annually of each of their countries' and territories' expected drug requirements, manufacture and production. Parties must provide estimates of the quantities of drugs to be consumed for medical and scientific purposes; quantities to be used for the manufacture of other drugs, Schedule III preparations, and substances not covered by the Convention; stocks of drugs<sup>120</sup>; quantities needed to be added to special stocks of

<sup>120</sup> Article 1(1)(x) defines 'stocks' as the amounts of drugs held in a country or territory for medical and scientific consumption, use to manufacture other drugs and substances, or export.

drugs<sup>121</sup>; the area and location of land on which opium poppy is to be cultivated; the approximate quantity of opium to be produced; the number of establishments which will manufacture synthetic drugs; and the quantities of drugs to be manufactured by each establishment. By virtue of Article 4(c), all these estimates are of countries' and territories' requirements, production and manufacture for medical and scientific purposes.<sup>122</sup> Estimates are required in relation to all drugs, but are not required in relation to preparations (other than the quantities of drugs used in preparation of Schedule III preparations).<sup>123</sup>

The word 'consumed' in subparagraph 1(a) of Article 19 does not mean consumed in the ordinary sense. As discussed above, Article 1(2) provides that 'a drug shall be regarded as "consumed" when it has been supplied to any person or enterprise for retail distribution, medical use or scientific research', or as put by the 1961 Commentary, when drugs have been transferred 'from the manufacturing or wholesale level of the drug economy to its retail level'.<sup>124</sup>

Under Article 19(3), Parties may furnish 'supplementary estimates' during the year, altering or adding to estimates furnished by the Party or established by the INCB. The purpose of allowing supplementary estimates is to enable Parties to comply with the Convention where their circumstances have changed, and new circumstances require increases or decreases in manufacture, import, stocks or special stocks.<sup>125</sup>

Article 19(5) requires that the estimates in Article 19(1) not be exceeded. This means that the actual quantities of drugs consumed in a territory, used for the manufacture of other drugs, uncontrolled substances or Schedule III preparations, held in stocks and/or added to special stocks at the end of the year must not exceed the estimates of those quantities for that territory.

Article 19(2) sets out the estimates of use and consumption, or production or manufacture, which must be taken into account in calculating the 'total of the estimates' for opium, synthetic drugs, and other drugs.

The calculated 'totals of the estimates' have three applications in the Convention: first, under Article 21(3), if the INCB finds that the quantity of a drug manufactured and imported by a country or territory in one year exceeds the total of the quantities specified in Article 21(1)<sup>126</sup> minus any deductions required under Article 21(2)<sup>127</sup>, the

<sup>121</sup> Article 1(1)(w) defines 'special stocks' as stocks held in a country or territory by the Government for special government purposes and exceptional circumstances.

<sup>122</sup> 1961 Commentary, p. 221, footnote 1.

<sup>123</sup> Article 2(3) and (4); article 19(1)(b).

<sup>124</sup> 1961 Commentary, p. 223.

<sup>125</sup> 1961 Convention, p. 237.

<sup>126</sup> The quantities specified in article 21(1) are the quantities of a drug consumed for medical and scientific purposes; used for the manufacture of other drugs, Schedule III preparations and uncontrolled substances; exported; added to the stock; and acquired for special purposes.

excess quantity must be deducted from the quantity to be manufactured and imported, and from *the total of the estimates*, for that country or territory in the following year; second, under Article 21(4), if the total quantity of drugs exported to a country exceeds *the total of the estimates* for that drug, the INCB may notify Parties that they must not authorise any further exports to that country during that year; and third, under Article 31(1)(b), Parties must not knowingly permit the export of any drug to any country or territory beyond the limits of *the total of the estimates* for that drug and that country or territory.

#### 4.7.2 Option 2 – changes to Article 19

As discussed above in relation to Article 12, the estimate system would need to be changed under Option 2 so that Parties would not be required to limit the quantities of drugs produced, manufactured, consumed, used and stored to the estimated quantities needed for medical and scientific purposes.

One possible approach would be to not extend the requirements for provision of estimates in Article 19 to non-medical and non-scientific consumption, use, production or manufacture, or the supply limits in Article 21 to non-medical and non-scientific consumption or use. Under this approach, Parties would continue to be required to furnish estimates in relation to medical and scientific use of drugs only, and to ensure that quantities of drugs actually consumed, used to manufacture other drugs, Schedule III preparations or uncontrolled substances, and produced and manufactured for medical and scientific purposes did not exceed relevant estimates for medical and scientific purposes. However, Parties would not be required to provide estimates for, or limit in this way, the quantities consumed, used, produced and manufactured for non-medical and non-scientific purposes. Similarly, Parties would only be required to furnish statistical returns in relation to medical and scientific use of drugs under Article 20. The limits on manufacture and import by any country or territory imposed by Article 21 (to the quantities consumed by the country or territory for medical and scientific purposes, used for manufacture of other drugs, uncontrolled substances or Schedule III preparations, exported, added to the stock or acquired for special purposes) would also need to be confined to manufacture and import for medical and scientific purposes, as would the limitation on the production of opium in Article 21 *bis*.

This approach would involve the minimum changes to the existing system of estimates and supply limits in order to allow Parties to permit production, manufacture, use and consumption of drugs beyond countries' and territories' requirements for medical and scientific purposes. The estimate system and supply limits would continue to assist the INCB to ensure an adequate supply of drugs to countries and territories for medical and scientific purposes, and to prevent over-supply of drugs for medical and scientific purposes. Under this approach, however, the estimate system, statistical return

<sup>127</sup> The deductions required under article 21(2) are any quantities of drugs seized and released for licit use, and/or taken from special stocks for civilian requirements.

requirements and supply limits would not have any application to supply, use or consumption of drugs for non-medical and non-scientific purposes. Therefore, they would not facilitate monitoring of, or help to prevent over-supply of drugs to, regulated non-medical and non-scientific domestic markets, or help to prevent diversion from those markets to illicit markets. It may be difficult to justify the discrepancy between the reporting and control measures required for medical and scientific markets in comparison with regulated non-medical and non-scientific markets, since the latter seem just as likely to be a source of diversion to illicit markets. In addition, this would be inconsistent with the existing approach under the Convention, which currently requires the furnishing of separate estimates in respect of the use of coca leaves for preparation of flavouring agents under Article 27, and which previously required the furnishing of separate estimates for permitted non-medical or quasi-medical uses of drugs pursuant to transitional reservations under Article 49, when these reservations were still in force.

Therefore, it is submitted that the better approach would be for the estimate system, statistical report requirements and supply limits to be extended to non-medical and non-scientific production, manufacture, use, stocks and consumption of drugs. Under this approach, Article 19 would need to be amended such that Parties would be required to furnish estimates of quantities of drugs to be consumed, used, held in stocks, produced and manufactured for both medical and scientific purposes and other purposes, and would be required to limit the quantities actually consumed, used, held in stocks, produced and manufactured for medical and scientific purposes and other purposes to the relevant estimates for those purposes.<sup>128</sup> Similarly, Article 20 would need to be amended to require Parties to furnish statistical returns in relation to production, manufacture, use, stocks and consumption of drugs for both medical and scientific purposes and other purposes. In addition, Article 21 would need to be amended to add quantities consumed for non-medical and non-scientific purposes, and quantities used to manufacture other drugs, Schedule III preparations and uncontrolled substances for non-medical and non-scientific purposes to the quantities to be taken into account under Article 21(1) in determining manufacture and import limits for each drug. (The proposed amendments to Articles 20 and 21 are discussed in more detail in sections 4.8 and 4.9 below.)

The 'totals of the estimates' which are calculated under Article 19(2) would need to be extended to estimates of quantities to be consumed, used, held in stocks, and produced and manufactured for non-medical and non-scientific, as well as medical and scientific purposes. This would be to ensure that the 'total of the estimates' would take into account both non-medical/non-scientific and medical/scientific estimates for the purposes of the provision in Article 21(4) for the INCB to embargo further exports to a country or territory if quantities exported to it exceed its total of estimates, and the

<sup>128</sup> But note that the existing requirements in relation to special stocks would not need to be changed, as special stocks (i.e. stocks held for special government purposes and exceptional circumstances) would still only be kept for medical and scientific purposes under Option 2.

prohibition in Article 31(1)(b) against Parties knowingly permitting the export of drugs to a country or territory beyond its total of estimates.

The changes to the system proposed under this approach would mean that the estimate and statistical return requirements would continue to enable the INCB to monitor countries' and territories' medical and scientific drug requirements, and assist the INCB to ensure an adequate supply of drugs for these purposes. In addition, these requirements, and the limits on manufacture and import, would enable the INCB to monitor the supply and consumption of drugs for licit non-medical and non-scientific purposes, as well as medical and scientific purposes, and assist the INCB to prevent over-supply to both markets. This approach would also be consistent with the existing requirement for estimates to be furnished in respect of the use of coca leaf as a flavouring agent, and the previous requirement for estimates to be furnished in respect of permitted non-medical and quasi-medical use of drugs, as discussed above.

To change the estimate system in the manner proposed, Article 19(1) would need to be amended to specify that separate estimates must be furnished in respect of the quantities set out in subparagraphs (a) (b), (c) and (f) and (h) of that article for both medical and scientific purposes, and for other purposes. This would have the effect of ensuring that the totals of the estimates calculated under Article 19(2) would be based on medical and scientific estimates and non-medical and non-scientific estimates, without the need for direct amendment of that provision, as Article 19(2) currently requires the totals of estimates to be based on the estimates set out in subparagraphs (a) (b), (c), (d) (f) and (h). Subparagraph (d) requires estimates of quantities of drugs needed for special stocks, which are amounts held by governments for special government purposes (including, particularly, military purposes) and exceptional circumstances (e.g. large-scale epidemics and earthquakes).<sup>129</sup> It is likely that all purposes for which special stocks may be used would be medical or scientific.

Unlike subparagraph (a) of Article 19(1), subparagraphs (b), (c), (f) and (h) as currently drafted, do not specify that estimates are only required in respect of medical or scientific purposes. However, this is clearly the case as, by virtue of Article 4(c), only medical or scientific use of drugs is permitted. The removal of Article 4(c) from the Convention as proposed under Option 2 would mean that the required estimates in these subparagraphs would extend to non-medical and non-scientific purposes, without amendment of the provision. However, it is proposed that the subparagraphs should be directly amended to make it clear that separate estimates would be required for medical and scientific purposes, and for other purposes, rather than aggregate estimates for all purposes.

In addition, as discussed in more detail above, the definition of 'stocks' in Article 1(1)(x) would need to be amended to remove its current limitation to amounts held for consumption for 'medical and scientific purposes', and the definition of 'consumed' in

<sup>129</sup> 1961 Convention, article 1(1)(w); 1961 Commentary, pp. 32–33.

Article 1(2) would need to be amended so that it would include quantities supplied to persons and enterprises for personal use.

#### 4.7.3 Option 2 – amendment of Article 19

The following amendments should be made to Article 19(1):

1. In subparagraph (a), after ‘medical and scientific purposes’, insert ‘, and other purposes’
2. In subparagraph (b), after ‘Convention’, insert ‘, for medical and scientific purposes, and other purposes’
3. In subparagraph (c), after ‘estimates relate’, insert ‘for medical and scientific purposes, and other purposes’
4. In subparagraph (f), after ‘produced’, insert ‘for medical and scientific purposes, and other purposes’
5. In subparagraph (h), after ‘preceding subparagraph’, insert ‘for medical and scientific purposes, and other purposes’.

#### ARTICLE 19. ESTIMATES OF DRUG REQUIREMENTS

1. The Parties shall furnish to the Board each year for each of the territories, in the manner and form prescribed by the Board, estimates on forms supplied by it in respect of the following matters:

- a) Quantities of drugs to be consumed for medical and scientific purposes, **and other purposes;**
- b) Quantities of drugs to be utilised for the manufacture of other drugs, or preparations in Schedule III, and of substances not covered by this Convention, **for medical and scientific purposes, and other purposes;**
- c) Stocks of drugs to be held as at 31 December of the year to which the estimates relate **for medical and scientific purposes, and other purposes;**
- d) Quantities of drugs necessary for addition to special stocks;
- e) The area (in hectares) and the geographical location of land to be used for the cultivation of the opium poppy;
- f) Approximate quantity of opium to be produced **for medical and scientific purposes, and other purposes;**
- g) The number of industrial establishments which will manufacture synthetic drugs; and
- h) The quantities of synthetic drugs to be manufactured by each of the establishments referred to in the preceding subparagraph **for medical and scientific purposes, and other purposes.**



## 4.8 Article 20 – statistical returns

### ARTICLE 20 [EXISTING TEXT]

#### Statistical Returns to be Furnished to the Board

1. The Parties shall furnish to the Board for each of their territories, in the manner and form prescribed by the Board, statistical returns on forms supplied by it in respect of the following matters:

- a) Production or manufacture of drugs;
- b) Utilisation of drugs for the manufacture of other drugs, of preparations in Schedule III and of substances not covered by this Convention, and utilisation of poppy straw for the manufacture of drugs;
- c) Consumption of drugs;
- d) Imports and exports of drugs and poppy straw;
- e) Seizures of drugs and disposal thereof;
- f) Stocks of drugs and disposal thereof;
- g) Ascertainable area of cultivation of the opium poppy.

...

#### 4.8.1 General comments on Article 20

Article 20 of the 1961 Convention requires Parties to provide to the INCB annual statistical returns in respect of each of their territories' drug production, manufacture, use to manufacture other drugs, substances or preparations, consumption, import, export, seizures, disposals and stocks, and areas of opium poppy cultivation.

The 1961 Commentary explains that the aims of these statistical returns include to indicate: a) whether a country or territory has exceeded its manufacture and import limits; b) whether Parties are complying with their obligations to prevent excessive accumulation of drugs by manufactures, traders and State enterprises; and c) the risks and size of diversions from licit sources to illicit channels. The statistical returns also allow the INCB to determine whether exports to a territory have exceeded the territory's estimates, and whether the INCB should impose an embargo on further exports to the territory, and may assist Parties to comply with their obligation to not knowingly permit

the export of drugs to a country or territory except within the limits of the total of the estimates for that country or territory.<sup>130</sup>

Paragraph 1 of Article 20 provides that the INCB must supply forms to Parties on which the statistical returns are to be provided. Current statistical return forms require specific information about more than 50 different drugs.<sup>131</sup> According to the 1961 Commentary, the INCB also has an implied right to request statistical returns from non-Parties to the Convention.<sup>132</sup>

As with 'consumed' in Article 19, 'consumption' in subparagraph (1)(c) of Article 20 has the specific meaning given in Article 1(2) – supply to a person or enterprise for retail distribution, medical use or scientific research.

Similar obligations to furnish statistical returns in respect of psychotropic substances are imposed on Parties by Article 16(4) of the 1971 Convention.

#### 4.8.2 Option 2 – changes to Article 20

As discussed above and below, it is proposed that Article 19 should be amended to require Parties to furnish separate estimates for medical/scientific markets, and non-medical/non-scientific markets in drugs, and that Article 21 should be amended to require non-medical or scientific use, consumption and additions to stocks of drugs to be taken into account in determining manufacture and import limits. Therefore, to ensure that statistical returns would continue to enable assessment of whether estimates have been exceeded and determination of manufacture and import limits, and to facilitate monitoring of non-medical/non-scientific markets in drugs, as well as medical/scientific markets, it is also proposed that Article 20(1) should be amended to require Parties to furnish separate statistical returns in respect of production, manufacture, use and consumption of drugs for medical or scientific purposes, as well as for non-medical and non-scientific purposes.

Article 20(1) does not specify that statistical returns are only required in respect of production, manufacture, use and consumption of drugs for medical or scientific purposes; however, this is the case by virtue of Article 4(c), because only medical or scientific production, manufacture, use and consumption of drugs is permitted. The removal of Article 4(c) from the Convention would mean that the requirements in Article 20(1) for provision of statistical returns would extend to non-medical and non-scientific production, manufacture, use and consumption of drugs, without amendment of the provision. However, Article 20(1) should be directly amended to make it clear that

<sup>130</sup> 1961 Commentary, p. 243.

<sup>131</sup> International Narcotics Control Board. Form C, Annual statistics on production, manufacture, consumption, stocks and seizures of narcotic drugs.  
[http://www.incb.org/pdf/forms/form\\_c/Form\\_C\\_14edition\\_09/Form\\_C\\_14\\_1209\\_English.pdf](http://www.incb.org/pdf/forms/form_c/Form_C_14edition_09/Form_C_14_1209_English.pdf)  
(accessed 8 July, 2012).

<sup>132</sup> 1961 Commentary, p. 244.

separate returns would be required for production, manufacture, use and consumption of drugs for medical and scientific purposes, and other purposes, rather than aggregate returns for all purposes.

#### 4.8.3 Option 2 – amendment of Article 20

The following amendments should be made to Article 20:

1. In paragraph (a), after 'drugs', insert 'for medical and scientific purposes, and other purposes'
2. In paragraph (b), after 'drugs', insert 'for medical and scientific purposes, and other purposes'
3. In paragraph (c), after 'drugs', insert 'for medical and scientific purposes, and other purposes'
4. In paragraph (d), after 'poppy straw', insert 'for medical and scientific purposes, and other purposes'
5. In paragraph (f), after 'thereof', insert 'for medical and scientific purposes, and other purposes'.

#### ARTICLE 20. STATISTICAL RETURNS TO BE FURNISHED TO THE BOARD

1. The Parties shall furnish to the Board for each of their territories, in the manner and form prescribed by the Board, statistical returns on forms supplied by it in respect of the following matters:

- a) Production or manufacture of drugs **for medical and scientific purposes, and other purposes;**
- b) Utilisation of drugs for the manufacture of other drugs, of preparations in Schedule III and of substances not covered by this Convention, and utilisation of poppy straw for the manufacture of drugs **for medical and scientific purposes, and other purposes;**
- c) Consumption of drugs **for medical and scientific purposes, and other purposes;**
- d) Imports and exports of drugs and poppy straw **for medical and scientific purposes, and other purposes;**
- e) Seizures of drugs and disposal thereof;
- f) Stocks of drugs and disposal thereof **for medical and scientific purposes, and other purposes;**
- g) Ascertainable area of cultivation of the opium poppy.

#### 4.9 Article 21 – manufacture and import limits

##### ARTICLE 21 [EXISTING TEXT]

###### Limitation of Manufacture and Importation

1. The total of the quantities of each drug manufactured and imported by any country or territory in any one year shall not exceed the sum of the following:

a) The quantity consumed, within the limit of the relevant estimate, for medical and scientific purposes;

b) The quantity used, within the limit of the relevant estimate, for the manufacture of other drugs, of preparations in Schedule III, and of substances not covered by the Convention;

c) The quantity exported;

d) The quantity added to the stock for the purpose of bringing that stock up to the level specified in the relevant estimate; and

e) The quantity acquired within the limit of the relevant estimate for special purposes.

2. From the sum of the quantities seized in paragraph 1 there shall be deducted any quantity that has been seized and released for licit use, as well as any quantity taken from special stocks for the requirements of the civilian population

3. If the Board finds that the quantity manufactured and imported in any one year exceeds the sum of the quantities specified in paragraph 1, less any deductions required under paragraph 2 of this article, any excess so established and remaining at the end of the year shall, in the following year, be deducted from the quantity to be manufactured and imported and from the total of the estimates as defined in paragraph 2 of article 19.

4. a) If it appears from the statistical returns on imports or exports (article 20) that the quantity exported to any country or territory exceeds the total of the estimates for that country or territory, as defined in paragraph 2 of article 19, with the addition of the amounts shown to have been exported, and after deduction of any excess as established in paragraph 3 of this article, the Board may notify this fact to States which, in the opinion of the Board, should be so informed;

b) On receipt of such a notification, Parties shall not during the year in question authorise any further exports of the drug concerned to that country or territory, except:

i. In the event of a supplementary estimate being furnished for that country or territory in respect both of any quantity over imported and of the additional quantity required, or

ii. In exceptional cases where the export, in the opinion of the Government of the exporting country, is essential for the treatment of the sick.

#### 4.9.1 General comments on Article 21

Article 21 of the 1961 Convention imposes limits on the quantities of drugs which may be manufactured and imported by each country and territory of Parties to the Convention. Paragraphs 1 and 2 of Article 21 of the 1961 Convention require Parties to ensure that quantities of drugs manufactured and imported by any country or territory in a given year do not exceed the quantities of drugs that have been consumed for medical and scientific purposes, utilised for the manufacture of other drugs, uncontrolled substances and Schedule III preparations, exported, added to the stock and acquired for special purposes. Article 21 does not impose such limits on *production* of drugs; therefore, the limits in Article 21 apply only to import of those drugs that are obtained by production rather than manufacture, i.e. opium, coca leaves, cannabis and cannabis resin. However, in relation to opium only, Article 21 *bis* requires production to be organised and controlled so that the annual quantity of opium produced by a country or territory does not exceed that country's or territory's (approximate) estimate of opium production. Article 24 also imposes a general requirement for Parties not to contribute to global overproduction of opium.<sup>133</sup>

The 1961 Commentary does not explain specifically why Article 21 does not impose general limits on production of drugs, as it does for manufacture and import. However, the Commentary notes in relation to Article 23 (requiring governmental control of cultivation and trade in opium) that countries which permit cultivation of the plants from which opium, coca leaves and cannabis are obtained cannot control with sufficient precision the quantities harvested by individual producers, or ascertain with sufficient precision the quantities which would enter controlled trade. In contrast, the Commentary notes that Governments can control the quantities, and movement, of drugs which enter legal markets through importation and manufacture.<sup>134</sup> The Commentary explains that this is the reason that the 1961 Convention does not allow private traders to purchase, or engage in wholesale or international trade in, cultivated plants, and instead requires this to be undertaken by government authorities.<sup>135</sup> The Commentary on the 1972 Protocol also notes that Article 19(1)(f) only requires that

<sup>133</sup> Article 24 requires Parties to take into account the 'prevailing world need for opium' in accordance with the estimates so as to not contribute to global overproduction of opium, and to not permit the initiation of, or an increase in existing, production of opium if it believes this may result in illicit traffic in opium. It also requires Parties to seek approval from the INCB to initiate production of opium for export (not exceeding 5 tons annually), or to increase production for export above five tons annually. In addition, article 22(1) provides that a Party must prohibit cultivation of opium poppy, coca bush or coca plant if the Party judges this to be the most suitable measure, given the prevailing conditions, for preventing the diversion of drugs into illicit traffic.

<sup>134</sup> 1961 Commentary, p. 278.

<sup>135</sup> 1961 Commentary, p. 278.

Parties furnish estimates of approximate quantity of opium to be produced, due to the difficulty of predicting with certainty the quantity that a harvest will yield.<sup>136</sup>

This suggests that the rationale for not imposing limits on production of drugs, along with limits on manufacture and import under Article 21, may be the difficulty for governments of controlling the quantities of plants cultivated and produced, and preventing the production of surplus quantities. The reason may also be that crops must be acquired by government authorities, under Articles 23, 26 and 28, which would minimise risks of diversion.

Paragraph 1 of Article 21 sets out the quantities of each drug which must be added up in calculating the annual manufacture and import limits for each drug in each country or territory. Paragraphs 2 and 3 set out quantities which must be deducted. Under paragraph 1, Parties must take into account: a) the quantity of the drug consumed in that year (i.e. supplied for retail distribution, medical use or scientific research) for medical or scientific purposes; b) the quantity used for manufacturing other drugs, Schedule III preparations, and uncontrolled substances; c) the quantity exported; d) the quantity added to the stock (for the purpose of bringing it to the level of the relevant estimate); and e) the quantity acquired for special purposes (i.e. for special government purposes or to meet exceptional circumstances).<sup>137</sup>

The quantities to be added together under Article 1(1) are the *actual* quantities that have been consumed, used, exported, added to the stock and acquired for special purposes in the relevant year, and are therefore different from the estimated quantities that must be furnished by governments under Article 19. However, under subparagraphs (a), (b) and (e), the quantities consumed, used and acquired for special purposes must be within the limits of the relevant estimates, and the quantity to be taken into account under paragraph (d) is the quantity actually added to the stock to bring it up to the level of the relevant estimate. This means that the total of these estimates, plus the quantity actually exported, represents the upper limit of the quantity of each drug that may be manufactured and imported by the country or territory.<sup>138</sup>

The figures to be used in determining these quantities are the estimates furnished by governments or established by the INCB under Article 19, and the statistical returns provided by governments under Article 20.<sup>139</sup>

Under paragraph 2, in determining manufacture and import limits, some quantities must be deducted from the sum of the quantities specified in paragraph 1: any quantity of drugs that has been seized and released for licit use (e.g. to retail outlets or non-profit

<sup>136</sup> United Nations. Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961, New York: United Nations, 1976, p. 58.

<sup>137</sup> Article 1(1)(x).

<sup>138</sup> 1961 Commentary, p. 265.

<sup>139</sup> 1961 Commentary, p. 263.

distributors), and any quantity taken from the special stocks for the requirements of the civilian population (i.e. for requirements other than special government purposes, which include, in particular, military purposes).

Paragraph 3 also requires the INCB to deduct any quantity of drugs manufactured and imported in excess of the limits established under paragraphs 1 and 2 from the quantity of drugs that a country or territory may manufacture or import in the following year, and from the total of the estimates under Article 19. (However, the INCB is only required to deduct quantities that remain at the end of the year in question, and not any excesses that occur but are then used up by consumption above estimated levels during the course of the year.)<sup>140</sup>

Paragraph 4 gives the INCB the power to notify Parties that they must cease authorising any further exports of drugs to a country or territory during the year in question, if it appears from statistical returns that the quantity of drugs exported to that country or territory exceeds its total of the estimates (after deduction of any excess required under paragraph 3). However, Parties are not required to comply with such a notification in respect of any over-imported quantities or additional quantities needed for which the country or territory furnishes a supplementary estimate,<sup>141</sup> or in exceptional cases where the export is 'essential for the treatment of the sick'.<sup>142</sup>

The 1961 Commentary points out that the quantities of drugs which would have to be imported to a country or territory to allow the INCB to impose an embargo on further exports to that country are likely to be greater than the manufacturing and import limits calculated under paragraphs 1–3 of Article 21. This is for a number of reasons, including that the INCB is not required under paragraph 4 to take into account quantities of drugs that the importing country or territory has manufactured (as it does not receive manufacturing statistics until after the year in which it could impose the embargo). Paragraph 4 is likely to be an ineffective control measure in relation to drugs which a country or territory manufactures itself,<sup>143</sup> and because the total of the estimates is the sum of estimated quantities under Article 19, whereas the manufacture and import limits are based on actual quantities, as discussed above.<sup>144</sup>

The 1961 Commentary also notes that the INCB does not apply paragraph 4 in cases of minor import excesses, and that a country or territory may end an embargo against it by furnishing supplementary estimates to raise its import limits.<sup>145</sup>

<sup>140</sup> 1961 Commentary, p. 268.

<sup>141</sup> Article 4(b)(i).

<sup>142</sup> Article 4(b)(ii).

<sup>143</sup> 1961 Commentary, p. 272.

<sup>144</sup> 1961 Commentary, p. 272.

<sup>145</sup> 1961 Commentary, p. 273.

#### 4.9.2 Option 2 – changes to Article 21

Currently, the manufacture and import limits for countries and territories determined under Article 21(1) are based on the quantities of drugs consumed, used and added to stocks of drugs for medical and scientific purposes only. Subparagraph (a) refers expressly to the quantity of drugs consumed ‘for medical and scientific purposes’. Subparagraph (d) is similarly limited by the definition of ‘stocks’ in Article 1(1)(x), which refers to consumption ‘for medical purposes’. No express reference to medical and scientific purposes is made in subparagraph (b) of Article 21(1), but the quantity of drugs used for manufacture of other drugs, substances and preparations must be confined to medical and scientific purposes by virtue of Article 4(c).

Therefore, to ensure that the manufacture and import limits reflect Parties’ actual drug use and consumption, use and addition to stocks for countries and territories for medical/scientific and non-medical/non-scientific purposes (and thus that Parties would be able to manufacture drugs for non-medical and non-scientific purposes without exceeding the limits), Article 21(1) would need to be changed so that the quantities to be taken into account in determining these limits would include total non-medical and non-scientific quantities, as well as medical and scientific quantities.

To achieve this, the references to ‘medical and scientific purposes’ would need to be removed in subparagraph (a) of Article 21(1) and in the definition of stocks in Article 1(1)(x) (as discussed above). No direct amendment of Article 21(1)(b) would be required, as no express reference to medical or scientific purposes is made in that provision and there would no longer be any requirement for use of drugs for manufacture to be confined to such purposes under Option 2 (due to the removal of Article 4(c)).

In addition, the word ‘estimate’ in subparagraphs (a), (b) and (d) would need to be made plural, as separate estimates would be required for medical/scientific purposes, and non-medical/non-scientific purposes, under the changes proposed to Article 19 (discussed above).

#### 4.9.3 Option 2 – amendment of Article 21

The following amendments should be made to Article 21:

1. In subparagraph 1(a), for ‘estimate’ substitute ‘estimates’, and delete ‘for medical and scientific purposes’
2. In subparagraph 1(b), for ‘estimate’ substitute ‘estimates’
3. In subparagraph 1(d), for ‘estimate’ substitute ‘estimates’.

#### ARTICLE 21. LIMITATION OF MANUFACTURE AND IMPORTATION

1. The total of the quantities of each drug manufactured and imported by any country or territory in any one year shall not exceed the sum of the following:



- a) The quantity consumed, within the limit of the relevant ~~estimate estimates, for medical and scientific purposes~~;
- b) The quantity used, within the limit of the relevant ~~estimate estimates~~, for the manufacture of other drugs, of preparations in Schedule III, and of substances not covered by the Convention;
- c) The quantity exported;
- d) The quantity added to the stock for the purpose of bringing that stock up to the level specified in the relevant ~~estimate estimates~~; and
- e) The quantity acquired within the limit of the relevant estimate for special purposes.
2. From the sum of the quantities seized in paragraph 1 there shall be deducted any quantity that has been seized and released for licit use, as well as any quantity taken from special stocks for the requirements of the civilian population
3. If the Board finds that the quantity manufactured and imported in any one year exceeds the sum of the quantities specified in paragraph 1, less any deductions required under paragraph 2 of this article, any excess so established and remaining at the end of the year shall, in the following year, be deducted from the quantity to be manufactured and imported and from the total of the estimates as defined in paragraph 2 of article 19.
4. a) If it appears from the statistical returns on imports or exports (article 20) that the quantity exported to any country or territory exceeds the total of the estimates for that country or territory, as defined in paragraph 2 of article 19, with the addition of the amounts shown to have been exported, and after deduction of any excess as established in paragraph 3 of this article, the Board may notify this fact to States which, in the opinion of the Board, should be so informed;
- b) On receipt of such a notification, Parties shall not during the year in question authorise any further exports of the drug concerned to that country or territory, except:
- i. In the event of a supplementary estimate being furnished for that country or territory in respect both of any quantity over imported and of the additional quantity required, or
  - ii. In exceptional cases where the export, in the opinion of the Government of the exporting country, is essential for the treatment of the sick.

#### 4.10 Article 21 bis (1) – limitation of opium production

##### ARTICLE 21 BIS [EXISTING TEXT]

##### Limitation of Production of Opium

1. The production of opium by any country or territory shall be organised and controlled in such manner as to ensure that, as far as possible, the quantity produced in any one year shall not exceed the estimate of opium to be produced as established under paragraph 1(f) of article 19.

#### 4.10.1 General comments on Article 21 *bis* (1)

Article 21 *bis* (1) was inserted in the 1961 Convention by the 1972 Protocol. It requires the production of opium to be organised and controlled so that, *as far as possible*, the annual quantity of opium produced by a country or territory does not exceed its estimate of opium production under Article 19(1)(f). The Commentary on the 1972 Protocol notes that a draft of Article 21 *bis* (1) was amended to include the words ‘as far as possible’ in recognition of the fact that advance estimates of the yield of opium produced from harvests are inexact.<sup>146</sup>

#### 4.10.2 Option 2 – changes to Article 21 *bis* (1)

Currently, the estimate of opium production required under paragraph (1)(f) of Article 19 is of the quantity of opium to be produced for medical or scientific purposes only, as production for other than medical or scientific purposes may not be permitted under Article 4(c). Under Option 2, production of opium for non-medical non-scientific purposes would be permitted, and thus opium production limits would need to be based on total estimates of production for medical and scientific purposes, and non-medical and non-scientific purposes. As discussed above, it is proposed under Option 2 that Article 19(1) should be amended so that Parties would be required to furnish separate estimates of opium production for medical and scientific purposes, and for non-medical and non-scientific purposes. The proposed changes would mean that paragraph (1)(f) of Article 19 would only refer to a Party’s estimate of the quantity of opium to be produced for medical and scientific purposes, and the requirement for Parties to furnish estimates of opium production for non-medical and non-scientific purposes would be contained in a new paragraph (1)(l). Therefore, Article 21 *bis* (1) would need to be amended to refer to the sum of the estimates established under paragraphs (1)(f) and (1)(l) of Article 19.

#### 4.10.3 Option 2 – amendment of Article 21 *bis* (1)

In Article 21 *bis* (1):

1. after ‘exceed the’, insert ‘sum of the’
2. for ‘estimate’, substitute ‘estimates’.

<sup>146</sup> United Nations. Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961, New York: United Nations, 1976, p. 58.

ARTICLE 21 *BIS*. LIMITATION OF PRODUCTION OF OPIUM

1. The production of opium by any country or territory shall be organised and controlled in such manner as to ensure that, as far as possible, the quantity produced in any one year shall not exceed the **sum of the estimate estimates** of opium to be produced as established under paragraph 1(f) of article 19.

**4.11 Articles 22, 23, 26 and 28 – opium poppy, coca bush and cannabis cultivation**

ARTICLE 22 [EXISTING TEXT]

Special Provision Applicable to Cultivation

1. Whenever the prevailing conditions in the country or territory of a Party render the prohibition of the cultivation of the opium poppy, the coca bush or the cannabis plant the most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic, the party concerned shall prohibit cultivation.
2. A Party prohibiting cultivation of the opium poppy or the cannabis plant shall take appropriate measures to seize any plants illicitly cultivated and to destroy them, except for small quantities required by the Party for scientific or research purposes.

ARTICLE 23 [EXISTING TEXT]

National Opium Agencies

1. A Party that permits the cultivation of the opium poppy for the production of opium shall establish, if it has not already done so, and maintain, one or more governmental agencies (hereafter in this article referred to as the Agency) to carry out the functions required under this article.
2. Each such Party shall apply the following provisions to the cultivation of the opium poppy for the production of opium and to opium:
  - a) The Agency shall designate the areas in which, and the plots of land on which, cultivation of the opium poppy for the purpose of producing opium shall be permitted.
  - b) Only cultivators licensed by the Agency shall be authorised to engage in such cultivation.
  - c) Each licence shall specify the extent of the land on which cultivation is permitted.
  - d) All cultivators of the opium poppy shall be required to deliver their total crops of opium to the Agency. The Agency shall purchase and take physical possession of such crops as soon as possible, but no later than four months after the end of the harvest.

e) The Agency shall, in respect of opium, have the exclusive right of importing, exporting, wholesale trading and maintaining stocks other than those held by manufacturers of opium alkaloids, medicinal opium or opium preparations. Parties need not extend this exclusive right to medicinal opium and opium preparations.

#### ARTICLE 26 [EXISTING TEXT]

##### The Coca Bush and Coca Leaves

1. If a party permits the cultivation of the coca bush, it shall apply thereto and to coca leaves the system of controls as provided in article 23 respecting the control of the opium poppy, but as regards paragraph 2 d) of that article, the requirements imposed on the Agency therein shall only be to take physical possession of the crops as soon as possible after the end of the harvest.

#### ARTICLE 28 [EXISTING TEXT]

##### Control of Cannabis

1. If a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy.

2. This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.

3. The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.

#### 4.11.1 General comments on Articles 22, 23, 26 and 28

Under Article 22 of the 1961 Convention, Parties are only required to prohibit cultivation of opium poppy, the coca bush or the cannabis plant if 'the prevailing conditions in the country or a territory of a Party render the prohibition of [such cultivation] the most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic'. 'Cultivation' is defined in Article 1 as cultivation of the opium poppy, coca bush or cannabis plant.

However, if Parties decide to permit cultivation of opium poppy, cultivation of coca bush, or cultivation of cannabis (other than for industrial purposes), they must apply the control measures required in Articles 23, 26 and 28 (respectively) to such cultivation. They must establish a government agency, which must designate the areas of land on which cultivation of the plants is permitted; only licensed cultivators may be authorised

to engage in cultivation; and cultivators must deliver crops of the plants to the government agency after they are harvested. The government agency must maintain a monopoly of wholesale and international trade in the drugs produced.

For example, cultivation of opium poppy for medical purposes is permitted in Tasmania in accordance with Article 23 of the Convention. The Tasmanian poppy industry, which supplies about half of the world's medicinal opiate market,<sup>147</sup> is controlled by the Poppy Advisory and Control Board, a government agency established under the *Poisons Act 1971* (Tas).<sup>148</sup> The Board's functions include to determine estimates of opium production, to ensure the security of Tasmania's opium crops, and to facilitate the destruction of opium poppy grown other than under a licence.<sup>149</sup> Licences to grow opium poppy are issued by the Minister for Health and Human Services, and are subject to a number of conditions, including that the licensee must take steps within 7 days after harvesting each crop to ensure that any remaining poppy material is destroyed, must destroy any regrowth from previous harvests, and must allow authorised persons to inspect the opium poppy crops at any time.<sup>150</sup> Under the *Poisons Act 1971* (Tas), cultivation of opium poppy other than under a licence, and in accordance with the conditions of that licence, is an offence.<sup>151</sup>

In relation to cultivation of cannabis, paragraph 3 of Article 28 additionally requires Parties to adopt necessary measures to prevent the 'misuse' of the leaves of the cannabis plant, as well as illicit traffic in the leaves. 'Misuse' and 'illicit traffic' in this context are not defined. The 1961 Commentary takes the position that "illicit traffic" is not used here in the sense defined in the Convention's Article 1; instead, the Commentary proposes that it 'is trade in the leaves, contrary to domestic legal provisions intended to combat their misuse, or to foreign laws governing their trade'.<sup>152</sup> Other comments later on the same page in the Commentary clearly recognise that nonmedical consumption of the leaves is not forbidden by Article 28(3). Given the definitions relating to cannabis in Article 1 (b), (c) and (d), illicit traffic here could be seen as referring to the extraction of cannabis resin for purposes forbidden by the Convention.

#### 4.11.2 Option 1 – changes to Articles 22, 23, 26 and 28

Essentially the only two options open to Parties in relation to cultivation of opium poppy, coca bush or cannabis plant are (a) to prohibit cultivation altogether; or (b) to

<sup>147</sup> Tasmanian Government Department of Justice website, Poppy Advisory & Control Board, <http://www.justice.tas.gov.au/poppy>, accessed 24 January 2011.

<sup>148</sup> *Poisons Act 1971* (Tas), section 59H.

<sup>149</sup> *Poisons Act 1971* (Tas), section 59I.

<sup>150</sup> Tasmanian Government Department of Justice website, Poppy Advisory & Control Board, <http://www.justice.tas.gov.au/poppy>, accessed 24 January 2011.

<sup>151</sup> *Poisons Act 1971* (Tas), section 52.

<sup>152</sup> 1961 Commentary, p. 315.

permit cultivation subject to these control measures. This means that Parties would not currently be allowed to permit small-scale cultivation of these plants for the production of drugs for personal use, unless they applied the control measures to the cultivation. In practice, it is likely that this would have the effect of preventing Parties from permitting small-scale cultivation (as applying the control measures to such cultivation is likely to be impracticable). Therefore, for the purposes of Option 1, Articles 22, 23, 26 and 28 would need to be amended, or changed in effect, to limit their application to cultivation of these plants for commercial purposes (i.e. with the intention to sell drugs produced from the plants or to otherwise receive pecuniary benefit).

The addition of the proposed new provision to the Convention would limit the application of Articles 22, 23, 26 and 28 in this way, without any need for direct amendment of these articles, as the new provision would remove non-commercial cultivation of small quantities of opium poppy, coca bush or cannabis plant from the scope of the Convention.

In relation to Parties' obligation to prevent 'misuse' of cannabis leaves in Article 28(3), any ambiguity in meaning would be removed by the addition of the new Article 3 *bis*, which would remove any non-commercial use of small quantities of cannabis leaves from the meaning of 'misuse'. Therefore, Parties' obligations would be limited to adopting necessary measures to prevent the use of any quantity of cannabis leaves to produce cannabis extracts for non-medical or non-scientific commercial purposes (i.e. for sale). Parties are obliged to make this a punishable offence in any case under Article 36, which requires Parties to make 'production' and 'extraction' of drugs contrary to the provisions of the convention punishable offences when committed intentionally. ('Production' is defined in Article 1(t) as 'the separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained'. Extraction is not defined but would clearly include extracting cannabis resin and other extracts from cannabis leaves.) Article 4(c) also requires Parties to limit production of drugs to medical and scientific purposes. Therefore, there may not be any need to retain the reference to 'misuse' in Article 28(3) following the addition of the new Article 3 *bis*.

#### 4.11.3 Option 2 – changes to Articles 22, 23, 26 and 28

Under Option 2, Parties would be allowed to permit cultivation of opium poppy, coca bush or cannabis plant for non-medical or non-scientific personal use, or for supply to the non-medical or non-scientific market. Parties would be required to apply the control measures in Articles 22, 23, 26 or 28 to cultivation of these plants for commercial use and/or where the cultivation is of more than small quantities. However, for the same reasons as under Option 1, it is proposed that the control measures should not apply in relation to cultivation of small quantities of these plants for non-commercial personal use.

The control measures in Articles 22, 23, 26 and 28 are not expressly limited to cultivation of opium poppy, coca bush or cannabis plant for medical or scientific purposes. Therefore, there would be no need to directly amend these provisions to extend their

application to cultivation of these plants for non-medical or non-scientific purposes for the purposes of Option 2. However, to ensure that cultivation of small amounts of the plants for non-commercial personal use would be exempt from these provisions, it is proposed, as under Option 1, that the new Article 3 *bis* should be added to the 1961 Convention to exempt non-commercial actions involving small quantities of drugs from the provisions of those Conventions, and that the proposed definition of ‘non-commercial purpose’ be added as Article 1(1)(o) *bis* of the 1961 Convention. This is discussed above in sections 2 and 3.

#### 4.12 Article 29 – licensing of drugs manufacture

##### ARTICLE 29 [EXISTING TEXT]

###### Manufacture

1. The Parties shall require that the manufacture of drugs be under licence except where such manufacture is carried out by a State enterprise or State enterprises.
2. The Parties shall:
  - a) Control all persons and enterprises carrying on or engaged in the manufacture of drugs;
  - b) Control under licence the establishments and premises in which such manufacture may take place; and
  - c) Require that licensed manufacturers of drugs obtain periodical permits specifying the kinds and amounts of drugs which they shall be entitled to manufacture. A periodical permit, however, need not be required for preparations.
3. The Parties shall prevent the accumulation, in the possession of drug manufacturers, of quantities of drugs and poppy straw in excess of those required for the normal conduct of business, having regard to the prevailing market conditions.

##### 4.12.1 General comments on Article 29

Under Article 29, Parties must control under licence all manufacture of drugs (except where carried out by a state enterprise), and all establishments and premises in which such manufacture occurs, and must also control generally all persons and enterprises engaged in such manufacture. ‘Manufacture’ means ‘all processes, other than production, by which drugs may be obtained and includes refining as well as the transformation of other drugs’.<sup>153</sup> Although this definition only refers to the manufacture

<sup>153</sup> Article 1(1)(n) of the 1961 Convention.

of 'drugs' (defined in Article 1(1)(j) as any substance in Schedule 1 and II of the Convention), the 1961 Commentary suggests that Parties must also apply the control measures in Article 29 to the manufacture *from* drugs of substances not covered by the Convention, or a 'serious gap' in the control system would exist.<sup>154</sup>

'Licence' in Article 29 and other provisions of the 1961 Convention refers to a written governmental authorisation, rather than necessarily a licence named as such in applicable domestic law. The general obligation in subparagraphs (a) and (b) of Article 29(2) for Parties to 'control' persons, enterprises, establishments and premises requires Parties to do more than just apply the licensing system or state ownership requirement in paragraph 1, but also requires Parties to apply reasonable additional control measures, such as excluding persons convicted of drug offences and performing inspections of drug factories.<sup>155</sup> The reference to 'persons' in subparagraph 2(a) of Article 29 is intended to include all physical persons participating in the manufacturing process.<sup>156</sup>

The requirements in Article 29(1) and Article 29(2), subparagraphs (a) and (b) also apply to all preparations of drugs<sup>157</sup> (but subparagraph (c) only applies to Schedule III preparations,<sup>158</sup> and none of the requirements applies to compounding of preparations by retail pharmacists and medical practitioners<sup>159</sup>).

#### 4.12.2 Option 1 – changes to Article 29

Article 29, therefore, would currently prevent a Party from permitting small-scale manufacture of drugs for personal use, other than under specific government authorisation. Accordingly, for the purposes of Option 1, the scope of Parties' obligations under Article 29 would need to be limited to manufacture of drugs for commercial purposes (i.e. with intent to receive pecuniary benefit) and/or manufacture of more than a small quantity of drugs.

As with Articles 23, 26 and 28, this would be the effect of the proposed new Article 3 *bis*. Parties would be required to ensure that the manufacture of drugs is licensed, and to apply the other requisite control measures in Article 29, only where such manufacture is of more than a small quantity of drugs and/or is for a commercial purpose.

<sup>154</sup> 1961 Commentary, p. 17.

<sup>155</sup> 1961 Commentary, p. 320.

<sup>156</sup> 1961 Commentary, p. 320.

<sup>157</sup> Articles 2(3) and (4) of the 1961 Convention.

<sup>158</sup> Article 2(3) of the 1961 Convention.

<sup>159</sup> 1961 Commentary, p. 317.



#### 4.12.3 Option 2 – changes to Article 29

Under Option 2, Parties would be allowed to permit manufacture of drugs for non-commercial or medical purposes, but would be required to apply the control measures in Article 29 to manufacture of more than a small quantity of drugs and/or for a commercial purpose. Article 29 is not expressly limited to manufacture of drugs for medical or scientific purposes; therefore, it would not need to be directly amended in order to apply to non-medical or non-scientific manufacture for the purposes of Option 2. As under Option 1, the effect of the proposed new Article 3 *bis* would be to exempt manufacture of a small quantity of drugs for non-commercial purposes from Article 29.

#### 4.13 Article 30(1) – distribution of drugs

##### ARTICLE 30 [EXISTING TEXT]

###### Trade and Distribution

1. a) The Parties shall require that the trade in and distribution of drugs be under licence except where such trade or distribution is carried out by a State enterprise or State enterprises:

b) The Parties shall:

- (i) Control all persons and enterprises carrying on or engaged in the trade in or distribution of drugs;
- (ii) Control under licence the establishments and premises in which such trade or distribution may take place. The requirement of licensing need not apply to preparations.

c) The provisions of a) and b) relating to licensing need not apply to persons duly authorised to perform and while performing therapeutic or scientific functions.

...

##### 4.13.1 General comments on Article 30(1)

Similar to Article 29 in relation to manufacture of drugs, Article 30(1) of the Convention requires the trade in and distribution of drugs to be licensed and controlled by governments. 'Distribution' is not defined in the Convention, but since Article 30(1) deals with trade and distribution in drugs, it may be that 'distribution' in paragraph 1 should be interpreted in this context as meaning commercial distribution. As noted above, the 1988 Commentary suggests that 'distribution' (as used in the provisions of the Convention dealing with criminalisation of illicit traffic in drugs) may be best understood as meaning the commercial role of ensuring that goods pass from manufacturer or importer to wholesaler or retailers, though the 1988 Commentary notes

that this should be compared to the heading of Article 30 – ‘Trade and Distribution’.<sup>160</sup> On the other hand, the ordinary meaning of distribution is ‘the act of sharing something out among a number of recipients’,<sup>161</sup> and the use of both terms ‘trade’ and ‘distribution’ in paragraph 1 could suggest that distribution was intended to have a wider meaning than distribution in or for the purposes of trade. Accordingly, it is possible that the obligations in paragraph 1 could be interpreted as extending to non-commercial distribution of drugs to recipients for their personal use. It may not be practicable for Parties to license small-scale distribution for personal use, so the effect of this interpretation may be to prevent Parties from permitting such distribution.

#### 4.13.2 Option 1 – changes to Article 30(1)

The new Article 3 *bis* would ensure beyond doubt that Parties would not be prevented by Article 30(1) from permitting non-commercial distribution of small quantities of drugs to recipients for their personal use for the purposes of Option 1. Parties would only be obliged to apply the control measures in Article 30(1) to distribution of more than a small quantity of drugs and/or distribution for a commercial purpose. Therefore, no direct changes to Article 30(1) would be needed.

#### 4.13.3 Option 2 – changes to Article 30(1)

It is proposed under Option 2 that Parties would be allowed to permit trade and distribution of drugs for non-medical or non-scientific purposes, but that trade in drugs, and distribution of more than small quantities of drugs for commercial purposes, should be subject to the control measures in Article 30(1). Again, there would be no need for direct amendment of Article 30(1) to achieve this. As under Option 1, the new Article 3 *bis* would ensure that non-commercial distribution of no more than a small quantity of drugs would be exempt from Article 30(1).

### 4.14 Article 30(2)(b) – medical prescriptions for drugs

#### ARTICLE 30 [EXISTING TEXT]

Trade and Distribution

...

2. The Parties shall also:

...

<sup>160</sup> 1988 Commentary, p. 55, footnote 127.

<sup>161</sup> Oxford Dictionary of English, Second Edition, revised. Oxford: Oxford University Press, 2009.

- b) (i) Require medical prescriptions for the supply, or dispensation of drugs to individuals. This requirement need not apply to such drugs as individuals may lawfully obtain, use, dispense or administer in connexion with their duly authorised therapeutic functions; and
- (ii) If the Parties deem these measures necessary or desirable, require that prescriptions for drugs in Schedule 1 should be written on official forms to be issued in the form of counterfoil books by the competent governmental authorities or by authorised professional associations.

#### 4.14.1 General comments on Article 30(2)(b)

Under Article 30(2)(b)(i), Parties are obliged to require medical prescriptions for the supply or dispensation of drugs to individuals. Under the second sentence of Article 30(2)(b)(i), the medical prescription requirement does not apply to drugs lawfully obtained, used, dispensed or administered by individuals as part of their authorised therapeutic functions (e.g. for acquisition or administration of drugs by medical practitioners). (According to the 1961 Commentary, this exemption merely made explicit what was already implied by the meaning of ‘medical prescription’ – authorisations given by medical practitioners for other persons to acquire drugs for their use, or to use drugs on particular humans or animals.) Nor does the medical prescription requirement apply to the retail trade in or distribution of Schedule II drugs<sup>162</sup> or their preparations,<sup>163</sup> or Schedule III preparations.<sup>164</sup>

#### 4.14.2 Option 1– changes to Article 30(2)(b)

The medical prescription requirement in Article 30(2)(b)(i) would currently prevent Parties from allowing the non-commercial supply or dispensation of small quantities of Schedule I drugs to individuals for their personal medical use other than by medical prescription. However, it is not clear whether the requirement would be considered to apply in relation to supply or dispensation of drugs to individuals for non-medical use. The requirement may be interpreted as preventing any supply or dispensation of drugs to individuals for non-medical use, as provision of a ‘*medical* prescription’ (emphasis added) would not be appropriate or possible for such use. Alternatively, the requirement for a ‘*medical* prescription’ could be interpreted as applying only in relation to supply or dispensation of drugs to individuals for medical use, such that supply or dispensation for non-medical use would be exempt from the requirement.

<sup>162</sup> Articles 30(6) and 2(2) of the 1961 Convention.

<sup>163</sup> Article 2(3) of the 1961 Convention

<sup>164</sup> Articles 2(3) and 2(4) of the 1961 Convention.

If the new Article 3 *bis* were to apply to Article 30(2)(b)(i), its effect would be that non-commercial supply or dispensation of small quantities of drugs to individuals would be exempt from the medical prescription requirement, whether for medical or non-medical use. Thus, the application of the medical prescription requirement would hinge on the quantity of drugs being supplied and whether the drugs were being sold or supplied for free. It is submitted that, irrespective of these matters, dispensation of drugs by medical prescription is an important safeguard for medical use of drugs, as it helps to ensure the suitability and safety of drugs in respect of a person's medical condition. It is suggested, therefore, that the most suitable basis for application of the medical prescription requirement is whether drugs are supplied or dispensed for medical use, and that the quantity of drugs and/or commerciality of the supply should not be determinative.

To achieve this outcome, Article 30(2)(b) would need to be exempted from the new Article 3 *bis* (as proposed above) so that Article 30(2)(b) would continue to apply to supply or dispensation of small quantities of drugs for other than commercial purposes. In addition, Article 30(2)(b)(i) should be amended directly to make it clear that the medical prescription requirement applies only in relation to medical use of drugs.

#### 4.14.3 Option 2 – changes to Article 30(2)(b)(i)

As under Option 1, the medical prescription requirement should apply in relation to any supply of drugs for medical use for the purposes of Option 2. For the same reasons as discussed above in relation to Option 1, Article 30(2)(b)(i) should be amended directly to make it clear that the medical prescription requirement would apply only in relation to medical use of drugs. In addition, Article 30(2)(b) should be exempted from the new Article 3 *bis* (as proposed above) so that medical prescriptions would continue to be required under Article 30(2)(b) for any supply or dispensation of drugs for medical purposes, irrespective of the quantity of drugs or whether the supply or dispensation were commercial.

#### 4.14.4 Options 1 and 2 – amendment of Article 30(2)(b)(i)

After 'dispensation of drugs to individuals', insert 'for medical use'.

### ARTICLE 30. TRADE AND DISTRIBUTION

2. The Parties shall also:

...

b) (i) Require medical prescriptions for the supply, or dispensation of drugs to individuals **for medical use**. This requirement need not apply to such drugs as individuals may lawfully obtain, use, dispense or administer in connexion with their duly authorised therapeutic functions;

#### 4.15 Article 31(1) – international trade

##### ARTICLE 31 [EXISTING TEXT]

###### Special Provisions Relating to International Trade

1. The Parties shall not knowingly permit the export of drugs to any country or territory except:
  - a) In accordance with the laws and regulations of that country or territory; and
  - b) Within the limits of the total of the estimates for that country or territory, as defined in paragraph 2 of article 19, with the addition of the amounts intended to be re-exported.
2. The Parties shall exercise in free ports and zones the same supervision and control as in other parts of their territories, provided, however, that they may apply more drastic measures.
3. The Parties shall:
  - a) Control under licence the import and export of drugs except where such import or export is carried out by a State enterprise or enterprises;
  - b) Control all persons and enterprises carrying on or engaged in such import or export.
4. a) Every Party permitting the import or export of drugs shall require a separate import or export authorisation to be obtained for each such import or export whether it consists of one or more drugs.
  - b) Such authorisation shall state the name of the drug, the international non-proprietary name if any, the quantity to be imported or exported, and the name and address of the importer and exporter, and shall specify the period within which the importation or exportation must be effected.
  - c) The export authorisation shall also state the number and date of the import certificate (paragraph 5) and the authority by whom it has been issued.
  - d) The import authorisation may allow an importation in more than one consignment.
5. Before issuing an export authorisation the Parties shall require an import certificate, issued by the competent authorities of the importing country or territory and certifying that the importation of the drug or drugs referred to therein, is approved and such certificate shall be produced by the person or establishment applying for the export authorisation. The Parties shall follow as closely as may be practicable the form of import certificate approved by the Commission.

#### 4.15.1 General comments on Article 31

Article 31(1) of the 1961 Convention prevents Parties from knowingly permitting the export of drugs to a country or territory, except in accordance with the laws of, and within the total of the estimates for, that country or territory (with the addition of amounts intended for re-export). In calculating the total of the estimates for the purpose of Article 31(1)(b), the quantities set out in Article 19(2) (discussed above in section 4.7) must be taken into account, and any manufacture and import surpluses must be deducted in accordance with Article 21(3) (discussed above in section 4.9).

However, the 1961 Commentary noted (in 1973) that in practice exporting Parties were often not in a position to take manufacture and import surplus deductions into account for the purposes of implementing Article 31(1)(b). This was because the INCB did not publish this information until late in the year for which the totals of the estimates were to be calculated – due to the dates by which Parties were required to provide this information to the INCB and the fact that Parties were often late in doing so. A further limitation of Article 31(1)(b) identified by the 1961 Commentary was that an exporting Party would not usually know, or be able to take into account, the quantities which other Parties had exported to a country or territory in the relevant year, as information on international trade was published by the INCB only after the end of the year. The INCB could, however, take this information into consideration and notify exporting Parties of any export excesses above the total of the estimates, and embargo further exports, under Article 21(4). The INCB now seems to regularly update estimates information on the INCB website to enable Parties to determine countries' import limits;<sup>165</sup> therefore, the limitations of Article 31(1)(b) may no longer exist.

Article 31(3) requires Parties to control import and export of drugs under licence, except where carried out by state enterprises, and to control all persons and enterprises undertaking or engaged in the import or export.

Under Article 31(4), a Party permitting import or export of drugs must require separate authorisations for each import and export (stating the name and quantity of the drug, the name and address of the importer or exporter, and the period within which the import or export must occur). Before issuing an export authorisation, a Party must require an import certificate from the importing country certifying that the import is approved.

#### 4.15.2 Option 1 – changes to Article 31

Article 31 would be subject to the new Article 3 *bis*. Consequently, under Option 1 Parties would not be required to apply the control measures set out in Article 31 to the import or export of small quantities of drugs for non-commercial use. However, any such international transfer of drugs would only be permissible between states or territories that both allowed export and import of small quantities of drugs for non-

<sup>165</sup> See [http://www.incb.org/incb/en/narcotic\\_drugs\\_estimates.html](http://www.incb.org/incb/en/narcotic_drugs_estimates.html).

commercial use. Export to a state or territory other than in accordance with that state or territory's laws and regulations would still be prohibited.

#### 4.15.3 Option 2 – changes to Article 31

Article 31 does not expressly limit the export of drugs to medical and scientific purposes; currently, this is the effect of Article 4(c). Therefore, the removal of Article 4(c) would mean that Parties could permit export of drugs for non-medical and non-scientific purposes, without the need to amend Article 31. The control measures in Article 31 would then apply to export of drugs for non-medical and non-scientific use. Under Articles 31(1)(a) and (b), Parties would be required to ensure that export of drugs was in accordance with the laws and regulations of the receiving country or territory, and within the limits of the total of the estimates for that country or territory, as defined in Article 19(2) (discussed above). Article 31(1)(a) would prevent Parties from exporting drugs for non-medical and non-scientific use to a country or territory that did not have a legalised non-medical and non-scientific domestic market. Parties would be required under Article 31(3) to control non-medical and non-scientific imports and exports of drugs under licence, and to control all persons and enterprises involved in imports and exports.

#### 4.16 Article 33 – possession of drugs without legal authority

##### ARTICLE 33 [EXISTING TEXT]

###### Possession of Drugs

The Parties shall not permit the possession of drugs except under legal authority.

##### 4.16.1 General comments on Article 33

Article 33 of the 1961 Convention prevents Parties from permitting the possession of drugs 'except under legal authority'. In combination with Article 4(c), the effect of Article 33 is to prevent Parties from authorising the possession of drugs other than for medical and scientific purposes, subject to the exceptions expressly permitted in the 1961 Convention (in Articles 2(9), 27 and 49).<sup>166</sup> Article 33 applies to all drugs and their preparations.<sup>167</sup>

A possible interpretation of the words 'except under legal authority' is that a Party must prohibit any possession of drugs unless the possession is pursuant to a positive grant of authority, such as an express right or permission under domestic law or a grant of

<sup>166</sup> 1961 Commentary, p. 402.

<sup>167</sup> 1961 Commentary, p. 403.

specific authority to possess the drugs (e.g. a licence, prescription, certificate or similar), rather than meaning possession that is contrary to the domestic law of the Party or the provisions of the Conventions. The usual meaning of ‘legal authority’ is a positive authority under law to commit a particular act or exercise a particular power (such as a permit), rather than committing an act or exercising a power in a way that is not contrary to law. However, it seems more likely that these words were intended to be read in conjunction with other provisions of the Convention dealing with possession – Articles 4(c) and 36 – such that possession ‘under legal authority’ should be interpreted as possession that is permitted for medical or scientific purposes, or for other limited purposes as allowed under the Convention (i.e. under the exemptions in Articles 2(9), 27 and 49). This interpretation is implied by the 1961 Commentary, which states that Article 33 must be read in connection with Article 4(c), to limit the possession of drugs exclusively to medical and scientific purposes (subject to the exemptions in the Convention).<sup>168</sup> In addition, the United Nations Commentary on the 1971 Convention (‘1971 Commentary’)<sup>169</sup> notes that Article 5(3) of the 1971 Convention, which declares it to be ‘desirable’ that Parties should ‘not permit the possession of substances in Schedule II, III and IV except under legal authority’, was intended to recommend that possession should only be permitted in accordance with legal conditions for the possession of those substances, and not to recommend that possession should be subject to a permit.<sup>170</sup>

#### 4.16.2 Option 1 – changes to Article 33

In any case, it is clear that Article 33 prevents Parties from permitting possession of drugs for non-medical personal use or non-commercial supply for recipients’ non-medical personal use, and would need to be amended or changed in effect for the purposes of Option 1.

The new Article 3 *bis* would have the effect of limiting Parties’ obligations under Article 33 to not permitting possession of more than small quantities of drugs, and not permitting possession of drugs for commercial purposes; therefore, no direct amendment of Article 33 would be needed for the purposes of Option 1.

#### 4.16.3 Option 2 – changes to Article 33

Under Option 2, the proposed removal of Article 4(c) from the Convention would mean that there would no longer be any requirement for Parties to limit possession of drugs to medical and scientific purposes, and consequently no requirement for Parties to make non-medical and non-scientific possession a punishable offence under Article 36(1) (discussed in detail below). However, it is unclear whether the removal of this limitation

<sup>168</sup> 1961 Commentary, p. 402.

<sup>169</sup> United Nations. Commentary on the Convention on Psychotropic Substances. New York: United Nations, 1976 (‘1971 Commentary’).

<sup>170</sup> 1971 Commentary, p. 143.



would automatically mean that possession for licit non-medical and non-scientific purposes (i.e. for non-medical and non-scientific use, manufacture, distribution or trade), would be interpreted as being ‘under legal authority’ for the purposes of Article 33, as there would be nothing in the Convention expressly allowing Parties to permit possession for such purposes.

Under Option 2 as set out here, Parties should still be required to prohibit possession of drugs, and make this a punishable offence, where the possession is for illicit purposes, that is, for manufacture, distribution of or trade in drugs other than in compliance with the control measures required under the Convention (whether for medical/scientific or non-medical/non-scientific purposes and subject to the exemption for actions relating to non-commercial use of small quantities of drugs). However, there would be no need to retain Article 33 to achieve this, as Article 36(2)(a)(ii) of the Convention requires Parties to establish as punishable offences preparatory acts in connection with the offences referred to in Article 36(1). As discussed further below in section 4.17, it is proposed under Option 2 that Article 36(1) should be amended to follow the general formula used in Article 22 of the 1971 Convention for describing the actions that Parties must treat as punishable offences – actions ‘contrary to a law or regulation adopted in pursuance of its obligations under this Convention’. Irrespective of this change, manufacture, distribution of or domestic trade in drugs other than in compliance with the control measures required under the Convention (and subject to the exemption for actions relating to non-commercial use of small quantities of drugs), and non-medical and non-scientific import or export of drugs, would have to be made punishable offences under Article 36(1). Accordingly, possession of drugs for any of these purposes would be a preparatory act according to 36(2)(a)(ii), and would also have to be made a punishable offence under that provision.

Therefore, to avoid any uncertainty as to which types of possession would be considered to be ‘under legal authority’ for the purposes of Article 33, and since there does not seem to be any need to retain the provision, it is proposed that Article 33 should be removed from the 1961 Convention under Option 2.

It should be noted that under Option 1, possession of drugs for non-medical and non-scientific purposes (other than possession of small quantities for non-commercial use) would also be a preparatory act to offences under Article 36(1), and therefore would have to be made a punishable offence under Article 36(2)(a)(ii), irrespective of Article 33. Therefore, it would also be possible for Article 33 to be removed from the Convention under Option 1. However, possession of small quantities of drugs for non-commercial purposes would clearly be exempt from the scope of Article 33 by virtue of the new Article 3 *bis*; therefore, retention of Article 33 would not give rise to any uncertainty under Option 1, and there would not be any particular need for it to be deleted.

#### 4.16.4. Option 2 – amendment of Article 33

Article 33 should be removed from the 1961 Convention under Option 2.

## ~~ARTICLE 33 POSSESSION OF DRUGS~~

~~The Parties shall not permit the possession of drugs except under legal authority.~~

### 4.17. Article 36 – punishable offences

#### ARTICLE 36 [EXISTING TEXT]

##### Penal Provisions

1. a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of Article 38.

2. Subject to the constitutional limits of a Party, its legal system and domestic law,

a) i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

ii) Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;

...

#### 4.17.1 General comments on Article 36

Article 36(1)(a) of the 1961 Convention requires Parties (subject to any constitutional limitations) to make all forms of participation in illicit drug trafficking activities

punishable offences when committed intentionally, including possession of drugs, and preparatory acts, conspiracy and attempts. Article 36(1)(a) specifically enumerates a number of actions which Parties must make punishable offences if they are contrary to the provisions of the 1961 Convention. It also provides a general formula – ‘any other action which in the opinion of such Party may be contrary to the provisions of this Convention’ – to cover any actions contrary to the Convention that are not specifically listed. Article 36(1)(b), inserted by the 1972 Protocol, allows Parties to provide for ‘abusers’ of drugs to undergo measures of treatment, education, after-care, rehabilitation and social integration as an alternative or in addition to punishment for the offences described in Article 36(1)(a).

The 1961 Convention is not self-executing and its provisions do not in themselves prohibit any conduct.<sup>171</sup> Therefore, it seems clear that the reference in Article 36(1) to activities which are, or which in the opinion of a Party may be, ‘contrary to the provisions of this Convention’ should be read as activities that would be contrary to domestic laws which must be adopted by Parties in accordance with their obligations under other provisions of the Convention.<sup>172</sup>

This interpretation is explicit in Article 22 of the 1971 Convention (the equivalent of Article 36 in relation to psychotropic substances), which requires Parties to establish as criminal offences any action ‘contrary to a law or regulation adopted in pursuance of its obligations under this Convention’. According to the United Nations Commentary on the Convention on Psychotropic Substances (‘1971 Commentary’), the Legal Adviser to the 1971 Conference explained that Article 22 was drafted in this way because non-self executing treaties, such as the 1961 Convention and the 1971 Convention, may only require the punishment of offences which are contrary to the domestic law of Parties.<sup>173</sup>

In relation to the 1961 Convention, the effect of this is that Parties are obliged to make the enumerated activities punishable offences where they are, and other activities where Parties judge that they may be, contrary to domestic laws adopted to fulfil Parties’ obligations under the Convention. By virtue of Parties’ general obligations under Article 4(c), therefore, the activities enumerated in Article 36 must generally be made punishable offences where they are undertaken for non-medical and non-scientific purposes. Under Article 2(5), Parties must prohibit activities with respect to Schedule IV drugs ‘except for amounts which may be necessary for medical and scientific research only’, if they judge this to be the most appropriate means of protecting the public health and welfare. Therefore, Parties would also be obliged under Article 36 to make activities with respect to Schedule IV drugs punishable offences if they elect to prohibit them under Article 2(5).

<sup>171</sup> Article 4(4) of the 1961 Convention; United Nations. *Commentary on the Convention on Psychotropic Substances*, New York: United Nations, 1976, (‘1971 Commentary’), p. 348.

<sup>172</sup> Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 76.

<sup>173</sup> 1971 Commentary, p. 348.

Other provisions of the Convention, for example, Articles 23, 26, 28, 29 and 30, require Parties to regulate conduct relating to use of drugs for medical and scientific purposes. Article 36(1) requires Parties to make activities listed in Article 36(1) punishable offences where they would not be in compliance with such regulations. For example, under Article 22 of the Convention (discussed above), Parties are not required to prohibit cultivation of opium poppy, coca bush or cannabis plants unless they judge that this is the most suitable measure for protecting public health and welfare. But if they decide to permit cultivation, they must apply the control measures set out in Articles 23, 26 or 28 (depending on the plant being cultivated). Cultivation not in compliance with these control measures would be contrary to the provisions of the Convention, and thus illicit, and Parties would be required to make such cultivation a punishable offence under Article 36(1).

The 1988 Commentary discusses the effect of the words ‘when committed intentionally’ in Article 3 of the 1988 Convention, which requires Parties to adopt such measures as may be necessary to establish as criminal offences ‘when committed intentionally’ specified activities in relation to drugs ‘contrary to the 1961 Convention, the 1961 Convention as amended or the 1971 Convention’.<sup>174</sup>

According to this Commentary, criminalisation of intentional conduct is the minimum obligation of the Parties in relation to these activities; it is also open to Parties to establish these activities as criminal offences when committed recklessly or negligently, or to establish the activities as strict liability offences.<sup>175</sup> Therefore, it seems clear that the words ‘when committed intentionally’ in Article 36(1) of the 1961 Convention should be interpreted in the same way in relation to Parties’ obligations to penalise conduct under that provision.

Article 36(1) requires Parties to make a number of specific steps in the creation of drugs punishable offences if contrary to the Convention: cultivation, production, manufacture,<sup>176</sup> extraction<sup>177</sup> and preparation.<sup>178</sup> Article 36(1) also requires Parties to make specific forms of participation in the supply of drugs punishable offences: offering,

<sup>174</sup> 1988 Commentary, p. 51.

<sup>175</sup> 1988 Commentary, p. 51.

<sup>176</sup> The definitions of ‘cultivation’, ‘production’ and ‘manufacture’ are discussed above in relation to article 4(c).

<sup>177</sup> The Convention does not define ‘extraction’ but this usually involves the derivation of drugs or taking out of drugs from a substance: Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 79.

<sup>178</sup> The Convention defines the noun ‘preparation’ (a mixture, solid or liquid, containing a drug), but does not define preparation as a process, as used in Article 36. The process of preparation, as used in Article 36, would involve preparing a substance for use as a drug, and in the context of drug supply would involve the mixing or compounding of substances, and the subsequent division into units and/or packaging of substances for medical or scientific use: 1988 Commentary, p. 54; Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 79.

offering for sale, distribution,<sup>179</sup> purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, and importation and exportation. Article 36 specifies both 'offering' and 'offering for sale', indicating that 'offering' must mean offering to provide drugs without consideration (i.e. offering drugs as gifts). 'Purchase' obviously means the buying of drugs, but for the same reasons as discussed below in relation to the meaning of 'possession', it is not entirely clear whether 'purchase' as used in Article 36(1) is limited to buying drugs for re-sale or extends to buying drugs for personal use.<sup>180</sup> It is likely that 'delivery' would include the provision of drugs to another as the result of a sale or agreement, or without consideration.<sup>181</sup>

It is important to note that 'use' of drugs is not listed in Article 36(1)(a), and, although Parties are required to limit use of drugs to medical and scientific purposes under Article 4(c), they are not required to make use a punishable offence under Article 36(1)(a). However, it is uncertain whether Article 36(1) requires Parties to make possession of drugs for personal consumption a punishable offence, or only possession for illicit distribution. Possession in Article 36(1) must be read in conjunction with Article 33, which provides that Parties must not permit the possession of drugs except under legal authority, and Article 4(c), which requires Parties to limit possession of drugs to medical and scientific purposes. According to the 1961 Commentary, Article 4(c) clearly refers to possession for both personal use and possession for trafficking, but it is not clear whether the provision must be implemented by imposing penal sanctions on possession for personal use. There is a view that Article 36(1) was only ever intended to deal with illicit trafficking,<sup>182</sup> and that Parties are free to interpret possession restrictively as meaning possession in the context of supply or with intent to supply.<sup>183</sup> This is based on the fact that an identical provision in a previous draft of the Convention was included in a chapter headed: 'Measures against illicit traffickers'. The final version of the Single Convention was not divided into chapters, so the chapter headings in the draft were deleted; however, Article 36 is still in the part of the Single Convention dealing with illicit traffic.<sup>184</sup> The use of terms relating to illicit trafficking surrounding 'possession' in Article 36 also suggests that illicit trafficking was the intended subject of the provision, and that 'possession' was intended to refer only to possession for

<sup>179</sup> See discussion of the meaning of 'distribution' in relation to Article 4(c) above.

<sup>180</sup> Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 83.

<sup>181</sup> Boister, 2001, p. 83.

<sup>182</sup> 1961 Commentary, p. 112.

<sup>183</sup> Dorn N, and Jamieson A. *Room for Manoeuvre: Overview of comparative legal research into national drug laws of France, Germany, Italy, Spain, the Netherlands and Sweden and their relation to three international drugs conventions*. London: Drugscope (for The Independent Inquiry on The Misuse of Drugs Act 1971, London), 2000.

<sup>184</sup> 1961 Commentary, p. 112.

supply.<sup>185</sup> On this basis, some Parties have taken the view that they are not obliged to penalise simple possession.<sup>186</sup>

#### 4.17.2 Option 1 – changes to Article 36(1)

As discussed, it is not entirely clear whether Parties are obliged to make possession or purchase of drugs for personal use punishable offences under Article 36(1)(a). In any case, it does seem clear that Parties are required under Article 36(1)(a) to make at least some of the enumerated actions punishable offences where undertaken for other than medical or scientific purposes or other than in compliance with regulatory control measures, including where undertaken solely for the purpose of non-commercial personal use (e.g. cultivation, manufacture, production, offering, importation and exportation).

The addition of the proposed new Article 3 *bis* to the Convention would have the effect of removing actions involving small quantities of drugs and taken for other than commercial purposes from the scope of Article 36(1) without any need for direct amendment of the provision. This would resolve the uncertainty with respect to Parties' obligations to penalise possession of drugs and other actions undertaken for the purpose of non-commercial personal use, and would mean that Parties' obligations under Article 36(1) would extend to making the specified actions punishable offences only where they are undertaken for commercial purposes and/or involve more than small quantities of drugs.

However, as discussed, the inclusion of both 'offering' and 'offering for sale' in Article 36(1)(a) indicates that the meaning of 'offering' must be limited to offering to provide drugs without payment. The new Article 3 *bis* would, therefore, effectively make 'offering' in Article 36(1)(a) redundant, other than in relation to offering large quantities of drugs. Given this limited residual meaning of 'offering', and to avoid any uncertainty that retention of the term may give rise to, the best course may be for 'offering' to be deleted.

#### 4.17.3 Option 1 – amendment of Article 36(1)(a)

The text 'offering,' should be deleted from Article 36(1)(a).

<sup>185</sup> Dorn and Jamieson, 2000.

<sup>186</sup> Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 81. For example, in South Australia Section 33L of the Controlled Substances Act 1984 (SA) makes simple possession of drugs an offence, but under Section 36 of the Act, police must refer an alleged simple possession offender to a drug assessment panel, which under Section 40 operates as a stay of proceedings for the alleged offence. After the assessment, Section 38 of the Act provides that the alleged offender must enter into an undertaking (for no longer than 6 months) involving participation in a treatment or rehabilitation program, upon which the criminal charges are withdrawn.

## ARTICLE 36. PENAL PROVISIONS

1. a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, ~~offering~~ offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

### 4.17.4. Option 2 – changes to Article 36(1)

Under Option 2, the proposed removal of Article 4(c) would mean that the actions listed in Article 36(1) would no longer be ‘contrary to the provisions of this Convention’ where undertaken for non-medical and non-scientific purposes, provided they were in compliance with laws or regulations that Parties are required to adopt under the Convention.<sup>187</sup> This would mean that Parties would no longer be required under Article 36(1) to make non-medical and non-scientific cultivation, production, manufacture, distribution, trade in, importation, exportation, possession or use of drugs punishable offences, where these actions were undertaken in compliance with applicable control measures, but would be required to penalise these actions where they did not comply with control measures (e.g. actions taken as part of illicit markets in drugs, or as part of licit markets but in breach of control measures, or export of drugs other than in accordance with the laws and regulations of the receiving country or territory).

Therefore, technically, there would be no need to amend Article 36(1) for the purposes of Option 2 because non-medical and non-scientific actions would not be contrary to the provisions of the Convention. However, a number of the actions listed in Article 36(1) are not specifically dealt with elsewhere in the Convention – ‘extraction’, ‘preparation’, ‘offering for sale’, ‘purchase’, ‘sale’, ‘delivery on any terms whatsoever’, ‘brokerage’, ‘dispatch’, ‘dispatch in transit’ and ‘transport’. Therefore, there may be some uncertainty as to the circumstances in which they would be considered to be ‘contrary to the provisions of this Convention’. All these actions would be specific steps or forms of participation in, or preparatory acts for, production, manufacture, distribution, trade and/or import or export. Therefore, it is likely that these actions would be considered to be ‘contrary to the provisions of this Convention’ if undertaken other than in compliance with laws or regulations that Parties are required to adopt under provisions of the

<sup>187</sup> Assuming that the correct interpretation of ‘contrary to the provisions of this Convention’ in Article 36(1) is contrary to domestic laws or regulations adopted by Parties in accordance with their obligations under other provisions of the Convention as discussed above.

Convention (Articles 23, 24, 26, 28-31) dealing with cultivation, production, manufacture, distribution, trade and/or import or export.

However, this is not entirely clear, and in any case, there does not appear to be any need for these additional actions to be specifically listed in Article 36(1). If these actions were undertaken as steps in, part of, or preparation for, cultivation, production, manufacture, distribution, trade and/or import or export contrary to laws/regulations that must be adopted under the Convention, Parties would be required to penalise the actions in any case – either because they directly constitute taking part in one or more of the relevant activities, or because they constitute intentional participation or preparatory acts in connection with such activities. Under Article 36(2)(ii) of the Convention, intentional participation, conspiracy and attempts to commit, and preparatory acts for any of the offences described in Article 36(1) must also be made punishable offences.

To avoid any uncertainty that may arise from the listing of these additional actions in Article 36(1), but to ensure Parties would still be required to make any action that is contrary to laws or regulations that Parties must adopt under the Convention a punishable offence, it is proposed that the approach in Article 22 of the 1971 Convention (discussed in detail below) should be followed, and that the specific actions listed in Article 36(1) should be replaced with a general reference to any action contrary to a law or regulation adopted in pursuance of a Party's obligations under the Convention.

#### 4.17.5. Option 2 – amendment of Article 36(1)

The following amendment should be made to Article 36(1).

In Article 36(1)(a):

1. after 'each Party shall':
  - a) delete 'adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be'
  - b) insert 'treat as a'
2. for 'offences', substitute 'offence'
3. after 'when committed intentionally,', insert 'any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention'
4. after 'obligations under this Convention, and', insert 'shall ensure'.



## ARTICLE 36. PENAL PROVISIONS

1. a) Subject to its constitutional limitations, each Party shall ~~adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention,~~ **shall be treat as a punishable offences**, when committed intentionally, **any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention**, and **shall ensure** that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

### 5. CHANGES TO THE 1971 CONVENTION – OPTIONS 1 AND 2

The proposed changes under both Options 1 and 2 to add Article 1 (c) *bis*, and Article 2 *bis*, are discussed above in sections 2 and 3 of this chapter.

#### 5.1. Article 5 – limitation of actions to medical and scientific purposes

### ARTICLE 5 [EXISTING TEXT]

#### Limitation of Use to Medical and Scientific Purposes

1. Each Party shall limit the use of substances in Schedule I as provided in Article 7.
2. Each Party shall, except as provided in Article 4, limit by such measures as it considers appropriate the manufacture, export, import, distribution and stocks of, trade in, and use and possession of, substances in Schedules II, III and IV to medical and scientific purposes.
3. It is desirable that Parties do not permit the possession of substances in Schedules II, II and IV except under legal authority.

##### 5.1.1. General comments on Article 5

Article 5 of the 1971 Convention, headed 'Limitation of Use to Medical and Scientific Purposes', sets out Parties' obligations to limit use and other actions with respect to Schedule I, II, III and IV psychotropic substances to medical and scientific purposes.

Article 5(1) requires Parties to limit the use of Schedule 1 substances as provided in Article 7. Article 7 (a) of the 1971 Convention requires Parties to prohibit all use of substances listed in Schedule 1 to the Convention, except for ‘scientific and very limited medical purposes by duly authorised persons’, in medical or scientific establishments that are directly controlled or specifically approved by their Governments. Article 7(b) obliges Parties to require manufacture, trade, distribution and possession of Schedule I substances to be under a special licence or prior authorisation, and Article 7(f) requires Parties to prohibit all export and import of the substances, except between competent authorities of the importing and exporting countries or regions, or other persons or enterprises specifically authorised by the competent authorities. Article 7 does not expressly limit these actions to scientific or very limited medical purposes. However, the official commentary on the 1971 Convention suggests that the limitation of the purposes of use of Schedule I substances must also apply by implication to these actions, as well as to import and export of the substances. This is because Schedule I substances are excluded from the limitation in Article 5(2) of these actions to medical and scientific purposes, indicating that those actions in respect of Schedule I substances were intended to be subject to a stricter limitation.<sup>188</sup>

According to the 1971 Commentary, Article 5(2) operates in a similar manner as Article 4(c) of the 1961 Convention. It requires Parties to limit, by such measures as they consider appropriate, international and domestic markets in substances in Schedules II, III and IV to medical and scientific purposes, including use and possession of these substances. (Article 4 of the 1971 Convention creates exceptions from the obligations imposed by Article 5 in relation to small quantities of preparations carried by travellers for personal use, use of substances in industry for manufacturing non-psychotropic substances or products, and the use of substances for the capture of animals by specifically authorised persons.)

It seems clear that possession in Article 5(2) refers to possession for non-commercial purposes (i.e. purposes related to personal use), and does not include possession for trade.

This is the view of the 1971 Commentary. The Commentary suggests that ‘possession’ in paragraph 3 of Article 5 must not include possession for the purpose of trade, since paragraph 3 indicates that it is not mandatory for Parties to prohibit the possession of substances in Schedules II, III and IV without legal authority.<sup>189</sup> If the meaning of possession in paragraph 3 were not limited to non-commercial possession, it would mean that Parties could permit possession of these substances for commercial purposes without legal authority. As the commentary points out, it is improbable that the 1971

<sup>188</sup> 1971 Commentary, pp. 138 and 156.

<sup>189</sup> As noted above, the 1971 Commentary explains (at p. 143) that the words ‘except under legal authority’, were intended to recommend that possession should only be permitted in accordance with legal conditions for possession, and not to recommend that possession should be subject to a permit.

Conference would have intended to allow this gap in the international control system.<sup>190</sup> The Commentary suggests that the 1971 Conference did not impose an obligation on Parties to prohibit possession of Schedule II, III and IV substances for personal consumption because it intended to leave it to Parties to decide whether or not to impose penal sanctions on ‘abusers’ of the substances.<sup>191</sup> (If Parties were so obliged, they would also be required to penalise possession of the substances for personal consumption under Article 22 of the Convention – see discussion of Article 22 below.)

It seems safe to assume that the drafters of the Convention would have intended the meaning of possession to be consistent in paragraphs 2 and 3 of Article 5, and accordingly that possession in paragraph 2 must also exclude possession for trade.

In addition, the Commentary suggests that use of the word ‘stocks’ in paragraph 2 means that Parties are obliged to limit the holding of Schedule II, III and IV substances by enterprises engaged in trade in these substances to medical and scientific purposes (i.e. that ‘stocks’ in paragraph 2 means possession of drugs of a sufficient quantity for trade). The Commentary argues that it can be assumed that the 1971 Conference would not have intended to include terms in paragraph 2 with overlapping meanings, and that this also suggests that the meaning of possession in paragraph 2 must not have been intended to include possession for purposes of trade, but must be restricted to possession for non-commercial purposes.<sup>192</sup>

It also seems clear that Parties’ obligation under paragraph 2 to limit ‘use’ of Schedule II, III and IV substances to medical and scientific purposes applies only to non-commercial use of the substances. Paragraph 2 is expressed to be subject to the exceptions in Article 4 of the Convention. Article 4(b) allows Parties to permit the use of substances in industry for the manufacture of non-psychotropic substances or products, subject to the application of control measures in the Convention to prevent abuse or recovery of the substances.<sup>193</sup> It seems clear that the meaning of ‘use’ in Article 5(2) would not include use of Schedule II, III and IV substances to manufacture other psychotropic substances or preparations, as this is covered by ‘manufacture’ – defined in Article 1(i) as ‘all processes by which psychotropic substances may be obtained, [including] refining as well as the transformation of psychotropic substances into other psychotropic

<sup>190</sup> 1971 Commentary, p. 142.

<sup>191</sup> 1971 Commentary, p. 143.

<sup>192</sup> 1971 Commentary, p. 142.

<sup>193</sup> Technically, the control measures in the 1971 Convention applying to ‘manufacture’ do not apply to industrial use of psychotropic substances to manufacture non-psychotropic substances, as this is not covered by the definition of manufacture in Article 1(i). However, the 1971 Commentary suggests that it is essential to the functioning of the 1971 Convention that Parties apply the licensing requirements and controls in Article 8, paragraphs 1, 2 and 4 to such industrial use of the substances, and that it is essential or at least desirable that Parties require record keeping in accordance with Article 11, and provide for inspection of manufacture in accordance with Article 15.

substances’, as well as the ‘making of preparations other than those made in prescriptions in pharmacies.’

According to the 1971 Commentary, the phrase ‘by such measures as it considers appropriate’ gives Parties broad discretion to decide upon the measures by which they will ensure that the specified activities are limited to medical and scientific purposes, except that they must include among those measures all the controls required by the Convention. Under Article 22, Parties must treat as punishable offences manufacture, export, import, distribution, holding stocks and trade in Schedule II, III and IV substances contrary to a law or regulation adopted to implement controls required by the Convention. The Commentary asserts that Parties need not apply penal sanctions to personal use or possession of these substances under Article 22, but must limit these actions to medical and scientific purposes by the administrative controls in the Convention (e.g. licensing of trade, requiring medical prescriptions, etc), and by taking action against illicit traffic.<sup>194</sup> (Whether or not Parties are obliged to penalise personal use and possession of psychotropic substances under Article 22 is discussed further below in relation to Article 22.)

#### 5.1.2. Option 1 – changes to Article 5

The addition of the proposed new Article 2 *bis* to the Convention would exempt non-commercial actions involving small quantities of drugs from Article 5, such that Parties’ obligations under paragraphs 2 and 3 would be confined to limiting the specified actions to medical and scientific purposes only where they are undertaken commercially or involve more than a small quantity of substances.

If the interpretations of ‘use’ in paragraph 2, and ‘possession’ in paragraphs 2 and 3 discussed above are correct, the new Article 2 *bis* would make the references to use and possession in paragraph 2, and the whole of paragraph 3, effectively redundant, and may lead to uncertainty.

Even if ‘use’ in Article 5(2) and ‘possession’ in Articles 5(2) and 5(3) were intended to include commercial use and possession, there would not appear to be any need to retain Article 5(3), or the references to use and possession in Article 5(2). This is because Article 22(2)(a)(ii) of the 1971 Convention (like Article 36(2)(a)(ii) of the 1961 Convention) requires Parties to establish as punishable offences intentional participation in, conspiracy and attempts to commit, and preparatory acts in connection with the offences referred to in Article 22. As discussed further below, Article 22 requires Parties to make any intentional action contrary to a law or regulation adopted in accordance with Parties’ obligations under the Convention a punishable offence. This means that non-medical and non-scientific manufacture, distribution, import, export of, and trade in

<sup>194</sup> 1971 Commentary, p. 144. Boister also argues that interpreting ‘appropriate measures’ to limit possession and to include non-penal measures is necessary in order to reconcile article 5(2) with article 5(3): Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 94.

drugs (in more than small quantities and/or for commercial purposes) would have to be made punishable offences under Article 22. Accordingly, use or possession of drugs for any of these purposes would constitute participation or a preparatory act in connection with an offence under Article 22, and would also have to be made a punishable offence under that provision.

Therefore, it seems clear that there is no need to retain Article 5(3), or the references to 'use and possession' on Article 5(2), and to do so may give rise to uncertainty. Accordingly, it is proposed that 'use and possession' should be deleted from paragraph 2, and that paragraph 3 be deleted altogether.

Article 5(1) should also be amended to ensure that, following the amendments to Article 7 that are proposed below, Parties would still be required to limit trade in Schedule I substances to medical and scientific purposes, and to limit use, manufacture, distribution, import, export and possession of Schedule I substances to medical and scientific purposes where such actions are for commercial purposes and involve more than small quantities of drugs. The need for this amendment of Article 5(1) is discussed below in relation to Article 7.

In addition, the heading of Article 5 – 'Limitation of Use to Medical and Scientific Purposes' – is part of the text of the Convention, and may be considered for the purpose of interpreting the provisions of Article 5. The unqualified reference to limitation of 'use' in this heading is contrary to the purposes of Option 1, and may give rise to uncertainty. Accordingly, it is proposed that the heading be amended to substitute 'Use' with 'Commercial Use'.

### 5.1.3. Option 1 – amendment of Article 5

The following amendments should be made to Article 5 under Option 1:

1. In the heading of Article 5, for 'Use' substitute 'Commercial Use'.
2. In paragraph 1:
  - (a) after 'limit the', insert ', trade in, and import, export, manufacture, distribution, possession and'
  - (b) for 'as provided in Article 7', substitute 'to medical and scientific purposes'.
3. In paragraph 2:
  - (a) after 'stocks of,' insert 'and'
  - (b) delete 'and use and possession,'.
4. Delete paragraph 3.

ARTICLE 5. LIMITATION OF **COMMERCIAL USE TO MEDICAL AND SCIENTIFIC PURPOSES**

1. Each Party shall limit the **trade in, and import, export, manufacture, distribution, possession and use** of substances in Schedule I ~~as provided in article 7~~ to **medical and scientific purposes**.
2. Each Party shall, except as provided in article 4, limit by such measures as it considers appropriate the manufacture, export, import, distribution and stocks of, **and trade in, and use and possession of**, substances in Schedules II, III and IV to medical and scientific purposes.
- ~~3. It is desirable that Parties do not permit the possession of substances in Schedules II, III and IV except under legal authority.~~

5.1.4. Option 2 – changes to Article 5

Article 5(2) of the 1971 Convention requires Parties to limit manufacture, export, import, distribution, stocks of, trade in, and use and possession of Schedule II, III and IV substances to medical and scientific purposes. Therefore, Article 5(2) would need to be removed from the Convention under Option 2 to allow Parties to permit non-medical and non-scientific markets in these substances.

For the same reasons as discussed above in relation to Option 1, Article 5(3) should also be deleted.

In addition, Article 5(1) should be deleted to remove the limitation of use of Schedule I substances as provided in Article 7 (to scientific and very limited medical purposes by duly authorised persons in Government controlled or approved medical establishments.). This is discussed further in section 7.2.

It should be noted that under Option 2, Parties would still be required to apply the control measures set out in Articles 8, 12 and 13 of the 1971 Convention to manufacture, distribution, import and export of, and trade in, Schedule II, III and IV substances, whether for medical/scientific or non-medical/non-scientific purposes.

Article 8 requires Parties to licence the manufacture of, trade (including international trade) in, and distribution of Schedule II, III and IV substances, to control all authorised persons involved in these activities, and to licence the establishments and premises in which these activities take place. (Article 8 is discussed further in section 5.3.)

Similar to Article 31(4) of the 1961 Convention, Article 12 of the 1971 Convention requires Parties permitting import or export of Schedule I or II substances to require separate import and export authorisations for each import and export, and to require an import certificate from the importing country before issuing an export authorisation. Article 13 allows a Party to notify other Parties that it prohibits import of specified

substances into its country or one or more of its regions, in which case Parties must take measures to ensure that it does not export the specified substances to the country or regions.

#### 5.1.5. Option 2 – amendment of Article 5

Article 5 should be deleted.

#### ~~ARTICLE 5. LIMITATION OF USE TO MEDICAL AND SCIENTIFIC PURPOSES~~

- ~~1. Each Party shall limit the use of substances in Schedule I as provided in article 7.~~
- ~~2. Each Party shall, except as provided in Article 4, limit by such measures as it considers appropriate the manufacture, export, import, distribution and stocks of, trade in, and use and possession of, substances in Schedules II, III and IV to medical and scientific purposes.~~
- ~~3. It is desirable that Parties do not permit the possession of substances in Schedules II, II and IV except under legal authority.~~

#### 5.2. Article 7 – prohibition of use of Schedule 1 substances

##### ARTICLE 7 [EXISTING TEXT]

###### Special Provisions Regarding Substances in Schedule 1

In respect of substances in Schedule 1, the Parties shall:

- a) Prohibit all use except for scientific and very limited medical purposes by duly authorised persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them;
- b) Require that manufacture, trade, distribution and possession be under a special licence or prior authorisation;
- c) Provide for close supervision of the activities and acts mentioned in paragraphs a) and b);
- d) Restrict the amount supplied to a duly authorised person to the quantity required for his authorised purpose;
- e) Require that persons performing medical and scientific functions keep records concerning the acquisition of the substances and the details of their use, such records to be preserved for at least two years after the last use recorded therein; and

f) Prohibit export and import except when both the exporter and importer are the competent authorities or agencies of the exporting and importing country or region, respectively, or other persons which are specifically authorised by the competent authorities of their country or region for the purpose. The requirements of paragraph 1 of Article 12 for export and import authorisations for substances in Schedule II shall also apply to substances in Schedule 1.

#### 5.2.1. General comments on Article 7

As discussed above, Article 7(a) of the 1971 Convention requires Parties to prohibit all use of Schedule 1 substances, except for scientific and very limited medical purposes by duly authorised persons in medical or scientific establishments. As noted, the 1971 Commentary suggests that Article 7 must also, by implication, require Parties to restrict the manufacture, import, export, trade, distribution, and possession of Schedule 1 substances to scientific and very limited medical purposes.

Paragraph (b) of Article 7 obliges Parties to require that manufacture, trade, distribution and possession be under a special licence or prior authorisation, and paragraph (c) requires Parties to provide for close supervision of the acts and activities referred to in paragraphs (a) and (b). Under paragraph (d), Parties must restrict the amount of Schedule I substances supplied to duly authorised persons to that required for the authorised person; under paragraph (e), Parties must require persons performing medical and scientific functions to keep records of acquisition and use of the substances; and under paragraph (f) Parties must prohibit export and import of the substances other than to and from competent authorities or agencies, or specifically authorised persons.

The 1971 Commentary suggests that 'duly authorised' in paragraph (a) means that persons must be individually authorised to use Schedule I substances (i.e. all medical practitioners could not automatically be authorised to do this), and that 'medical or scientific establishment' means a place devoted to medical treatment or scientific research. Such an establishment must be directly controlled or specifically approved by the Government.<sup>195</sup>

It is unclear whether Parties' obligation under Article 7(a) to prohibit all 'use' of the substances other than in the defined circumstances includes obligations to prohibit commercial non-medical and non-scientific use of the substances (such as use to manufacture other psychotropic substances and preparations or other use in trafficking), or personal non-medical use of the substances, or both.

The exemption in Article 4(b) of the Convention in respect of the use of psychotropic substances in industry for the manufacture of non-psychotropic substances does not

<sup>195</sup> Article 7(a) of the 1971 Convention.



apply to Schedule 1 substances. In addition, 'manufacture' (of psychotropic substances and preparations) is not expressly enumerated in Article 7(a) as an action that must be prohibited other than in the defined circumstances. This may indicate that the obligation in Article 7(a) to prohibit non-scientific or medical 'use' of Schedule I substances includes obligations to prohibit commercial use.

The 1971 Commentary suggests that Article 7(a) is intended to require Parties to prohibit *only* use of Schedule I substances for the purpose of trafficking, and not personal use of the substances, as the controls in Article 7 relate to suppliers rather than consumers of Schedule I substances.<sup>196</sup> (These comments were made in the context of discussion of whether Article 22(1)(a) of the Convention requires Parties to make non-medical personal use of Schedule I substances a punishable offence, which hinges on whether Parties are required to prohibit such use of the substances under Article 7 – see discussion of Article 22(1)(a) below.) The Commentary argues that although use and acquisition for use of the substances are 'unauthorised actions', they cannot be actions contrary to laws or regulations that Parties are required to adopt under the Convention. Since a person who acquires or consumes a Schedule 1 substance must also possess that substance, whether that person must be punished as an offender depends on whether possession for personal consumption must be made a punishable offence under Article 22(1)(a). (The Commentary argues that it must be – see discussion of Article 22(1)(a) below.)

It is submitted, however, that it is more likely that Article 7(a) was intended to define the narrow circumstances in, and the purposes for which, use of Schedule I substances may be permitted, and to require Parties to prohibit *all* other use of the substances – including personal consumption. This is indicated by a literal interpretation of Article 7(a) – 'Parties shall...prohibit *all use* except for scientific and very limited medical purposes by duly authorised persons...' (emphasis added). The fact that the purposes and circumstances of permitted use in Article 7(a), and the controls over permitted actions in the remainder of Article 7, relate to suppliers does not seem to indicate that Article 7(a) was not intended to require Parties to prohibit use by consumers.

### 5.2.2. Option 1 – changes to Article 7

For the reasons discussed above, it seems likely that Article 7(a) requires Parties to prohibit personal use as well as commercial use of Schedule I substances for other than scientific or very limited medical purposes. Although Article 7(a) does not expressly limit manufacture, trade, distribution, possession, import or export of Schedule I substances to medical and scientific purposes, the 1971 Commentary suggests that the limitation of use of Schedule I substances in Article 7(a) to scientific or very limited medical purposes also applies by implication to these other actions.<sup>197</sup>

<sup>196</sup> 1971 Commentary, p. 349; Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 93, footnote 97.

<sup>197</sup> 1971 Commentary, pp. 138 and 156.

Accordingly, for the purposes of Option 1, Article 7(a) would need to be changed so that Parties would no longer be required to prohibit non-commercial use, manufacture, import, export, distribution and possession of small quantities of drugs for other than medical or scientific purposes, but would continue to be required to prohibit these activities where they involve more than a small quantity of drugs and are for commercial, non-medical and non-scientific purposes. (It is submitted that the medical use exception to the prohibition requirement in Article 7(a) should be changed from ‘very limited medical purposes’ to ‘medical purposes’, as Parties should not be required to prohibit any legitimate medical use of the substances.)

The new Article 2 *bis* would exempt non-commercial use of small quantities of Schedule I substances and related actions from the requirements of Article 7(a). However, as discussed above, Article 7(a) also obliges Parties to require that use of Schedule I substances be limited to duly authorised persons in Government controlled or authorised medical or scientific establishments. If the proposed new Article 2 *bis* were to apply to Article 7(a), Parties would be exempt from applying this requirement to medical or scientific use of small quantities of Schedule I substances for non-commercial purposes.

As with the medical prescription requirement in Article 30(2)(b), it is submitted that use of Schedule I substances *for scientific and medical purposes* should continue to be subject to the control measure in Article 7(a) irrespective of the quantity of the substances involved or whether the use is for commercial purposes. These measures arguably provide necessary safeguards in relation to scientific and medical use of Schedule I substances, and the purpose of Option 1 is not to remove Parties’ obligations to impose such safeguards. Therefore, it is submitted that Article 7(a) should not be subject to the exemption in the new Article 2 *bis* to the extent that it applies to medical and scientific use of drugs. This means that another method would be needed to exclude non-commercial actions involving small quantities of drugs for other than medical or scientific purposes from the requirements of Article 7(a).

To achieve these outcomes, it is proposed that Article 7(a) should be excluded from the new Article 2 *bis*. In addition, Article 5(1), which would be subject to the new Article 2 *bis*, should be amended as proposed above so that Parties’ obligations to limit use, manufacture, import, export, distribution and possession of Schedule I substances to medical and scientific purposes would be set out explicitly in that provision, rather than in Article 7(a), and non-commercial actions in relation to small quantities of substances would be exempt from this obligation. (Given the heading and purpose of Article 5 – limitation of use and actions to medical and scientific purposes – it seems sensible for this obligation to be contained in Article 5(1), and this would also allow the exemption in Article 2 *bis* to apply to the obligation.)

Article 7(a) would need to be amended to specify that the control measures in this provision apply only in relation to medical and scientific use of Schedule I substances. In addition, Article 7(a) would need to be amended to remove the obligation to prohibit all other use of the substances, as it is proposed that the obligation to limit use of Schedule I

substances (of more than a small quantity of substances and/or for commercial purposes) to medical and scientific purposes would be imposed under the amended Article 5(1).

### 5.2.3. Option 2 – changes to Article 7

As discussed above, it seems clear that Article 7(a) of the 1971 Convention is intended to define the narrow circumstances in, and purposes for which, use of Schedule I substances may be permitted, and to require Parties to prohibit all other use of the substances. Therefore, Article 7(a) in combination with Article 5(1), requires Parties to prohibit all use of Schedule I substances for other than scientific or very limited medical purposes. Although Article 7(a) does not expressly limit manufacture, trade, distribution, possession, import or export of Schedule I substances to medical and scientific purposes, the 1971 Commentary suggests that the limitation of use of Schedule I substances in Article 7(a) to scientific or very limited medical purposes also implies by implication to these other actions.<sup>198</sup>

Therefore, for the purposes of Option 2, Article 7(a) would need to be amended to remove the requirement for Parties to prohibit all use, and by implication all manufacture, distribution, import, export, possession of and trade in, Schedule I substances for other than scientific and very limited medical purposes. Article 5(1), which requires Parties to limit the use of Schedule I substances as provided in Article 7, should also be removed.

However, the requirement in Article 7(b) for Parties to require manufacture, trade, distribution and possession of the substances to be under a special licence or prior authorisation, would need to be retained under Option 2. The requirement in Article 7(f) for export and import of Schedule I substances to be allowed only when both the exporter and importer are the competent authorities and agencies of, or specifically authorised by, the relevant country or region, would also be retained. In addition, for the same reasons discussed above in relation to Option 1, the requirement for all medical and scientific use to be by duly authorised persons in Government-controlled or -approved medical and scientific establishments should be retained. However, as under Option 1, Article 7(a) should be excluded from the exemption in the proposed new Article 2 *bis*, so that the requirement would apply to all medical use of Schedule I substances, irrespective of the quantity of substances or commerciality of purpose.

To achieve these outcomes, it is proposed that Article 7(a) should be amended in the same manner as proposed under Option 1 – to specify that the control measure required under that provision applies only in relation to medical and scientific use of Schedule I substances. In addition, Article 5(1) should be deleted, and Article 7(a) should be expressly excluded from the new Article 2 *bis*.

<sup>198</sup> 1971 Commentary, pp. 138 and 256.

### 5.2.3. Options 1 and 2 – amendment of Article 7

The following amendment should be made to Article 7:

1. In paragraph (a), for 'Prohibit all use except for scientific and very limited medical purposes', substitute 'Require all medical and scientific use to be undertaken or supervised'.

#### ARTICLE 7. SPECIAL PROVISIONS REGARDING SUBSTANCES IN SCHEDULE 1

In respect of substances in Schedule 1, the Parties shall:

- a) ~~Prohibit all use except for scientific and very limited medical purposes~~ **Require all medical and scientific use to be undertaken or supervised** by duly authorised persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them;
- b) Require that manufacture, trade, distribution and possession be under a special licence or prior authorisation;
- c) Provide for close supervision of the activities and acts mentioned in paragraphs a) and b);
- d) Restrict the amount supplied to a duly authorised person to the quantity required for his authorised purpose;
- e) Require that persons performing medical and scientific functions keep records concerning the acquisition of the substances and the details of their use, such records to be preserved for at least two years after the last use recorded therein; and
- f) Prohibit export and import except when both the exporter and importer are the competent authorities or agencies of the exporting and importing country or region, respectively, or other persons which are specifically authorised by the competent authorities of their country or region for the purpose. The requirements of paragraph 1 of Article 12 for export and import authorisations for substances in Schedule II shall also apply to substances in Schedule 1.

### 5.3. Article 8 – licences for manufacture, trade and distribution

#### ARTICLE 8 [EXISTING TEXT]

Licences

1. The Parties shall require that the manufacture of, trade (including export and import trade) in, and distribution of substances listed in Schedules II, III and IV be under licence or other similar control measure.

2. The Parties shall:

a) Control all duly authorised persons carrying on or engaged in the manufacture of, trade (including export and import trade) in, or distribution of substances referred to in paragraph 1;

b) Control under licence or other similar control measure the establishments and premises in which such manufacture, trade or distribution may take place; and

c) Provide that security measures be taken with regard to such establishments and premises in order to prevent theft or other diversion of stocks.

3. The provisions of paragraph 1 and 2 of this article relating to licensing or other similar control measures need not apply to persons duly authorised to perform and while performing therapeutic or scientific functions.

...

### 5.3.1. General comments on Article 8

Article 8(1), and Article 8(2), subparagraphs (a) and (b), impose substantially the same obligations on Parties in respect of control of manufacture, trade in and distribution of Schedule II, III and IV psychotropic substances as Article 29(1) and Article 29(2), subparagraphs (a) and (b), and Article 30(1) of the 1961 Convention, and the discussion of Articles 29 and 30 (above) also applies to Article 8. (The only significant difference between Article 8 and those provisions of the 1961 Convention as they apply to manufacture, trade and distribution is that Article 8(2)(a) requires the control of all 'duly authorised' persons and enterprises, whereas the relevant provisions of the 1961 Convention require the control of *all* persons and enterprises. The reason for this discrepancy was to ensure Parties were not obliged to apply control measures to all persons entering or leaving a place of manufacture, trade or distribution.<sup>199</sup>)

### 5.3.2. Option 1 – changes to Article 8

Accordingly, the effect of the proposed new Article 2 *bis* on Parties' obligations to control manufacture and distribution of psychotropic substances under Article 8 would be the same as the effect in the 1961 Convention of the proposed new Article 3 *bis* on Parties' obligations under Articles 29 and 30, as discussed above. Parties would only be

<sup>199</sup> 1971 Commentary, p. 172.

obliged to apply the control measures in Article 8 to distribution and manufacture of psychotropic substances where undertaken for commercial purposes.

It may be that irrespective of the new Article 2 *bis* 'manufacture' and 'distribution' in Article 8 would be interpreted as commercial manufacture and distribution, since Article 8 deals with the control of trade in psychotropic substances. As noted above, the 1988 Commentary suggests that 'distribution' (as used in the provisions of the 1988 Convention dealing with criminalisation of illicit traffic in drugs) may be best understood as meaning the commercial role of ensuring that goods pass from manufacturer or importer to wholesaler or retailers.<sup>200</sup> But, as in relation to Article 30(1) of the 1961 Convention (discussed above), it is also arguable that the ordinary meaning of 'distribution' is sharing out to recipients, and that 'trade' and 'distribution' in Article 8 would not have been intended to have overlapping meanings. Therefore, it is also possible that 'distribution' in Article 8 may include distribution other than in trade. The new Article 2 *bis* would remove any uncertainty, and ensure that non-commercial distribution and manufacture of psychotropic substances were exempt from Article 8.

### 5.3.3. Option 2 – changes to Article 8

Similarly under Option 2, the proposed new Article 2 *bis* would exempt manufacture, distribution of small quantities of Schedule II, III and IV substances for other than commercial purposes from the scope of Article 8 so that Parties would not be required to apply the control measures in Article 8 to those activities. However, Parties would be required to apply the control measures to manufacture and distribution of those substances where more than a small quantity is involved or the purpose is commercial, and to trade (including international trade) in any quantity of the substances, whether or not the manufacture, distribution or trade were for medical/scientific or non-medical/non-scientific markets.

Parties would be required to make manufacture, distribution, trade, import and export of Schedule II, III and IV substances other than in compliance with the Article 8 control measures punishable offences under Article 22 of the 1971 Convention. Article 22 is discussed below.

## 5.4. Article 9 – medical prescriptions

### ARTICLE 9 [EXISTING TEXT]

#### Prescriptions

1. The Parties shall require that substances in Schedules II, III and IV be supplied or dispensed for use by individuals pursuant to medical prescription only, except when

<sup>200</sup> 1988 Commentary, p. 55.

individuals may lawfully obtain, use, dispense or administer such substances in the duly authorised exercise of therapeutic or scientific functions.

2. The Parties shall take measures to ensure that prescriptions for substances in Schedules II, III and IV are issued in accordance with sound medical practice and subject to such regulation, particularly as to the number of times they may be refilled and the duration of their validity, as will protect the public health and welfare.

3. Notwithstanding paragraph 1, a Party may, if in its opinion local circumstances so require and under such conditions, including record-keeping, as it may prescribe, authorise licensed pharmacists or other licensed retail distributors designated by the authorities responsible for public health in its country or part thereof to supply, at their discretion and without prescription, for use for medical purposes by individuals in exceptional cases, small quantities, within limits to be defined by the Parties, of substances in Schedules III and IV.

#### 5.4.1. General comments on Article 9

Article 9(1) imposes substantially the same obligation on Parties to require medical prescriptions for supply and dispensation of Schedule II, III and IV psychotropic substances as *Article 30(2)(b)* of the 1961 Convention imposes in relation to Schedule I narcotic drugs (except that *Article 30(2)(b)(ii)* of the 1961 Convention additionally obliges Parties to require official counterfoil prescriptions if they consider this necessary or desirable). Therefore the discussion of *Article 30(2)(b)* above also applies in relation to *Article 9(1)*.

*Article 9(2)* imposes additional obligations for Parties to ensure prescriptions are issued according to sound medical practice, and regulated to ensure protection of public health and welfare (e.g. by limiting refills and duration of validity). (According to the UN Commentary on the 1971 Convention, although not express obligations in the 1961 Convention, Parties would be required to take similar measures in relation to narcotic drugs pursuant to their obligation under *Article 4(c)* to limit the use of drugs to medical and scientific purposes.)

*Article 9(3)* allows Parties to permit licensed pharmacists or retail distributors to supply small quantities of Schedule III and IV (but not Schedule II) substances for medical purposes without prescription in exceptional cases where local circumstances require this, that is, in conditions which warrant the exception for public health reasons.<sup>201</sup>

*Article 9* does not apply to Schedule I substances, which are subject to the stricter requirements of *Article 7*, and must only be used by duly authorised persons for very limited medical purposes.

<sup>201</sup> 1971 Commentary, pp. 190–191.

#### 5.4.2. Options 1 and 2 – changes to Article 9

As with Article 30(2)(b) and the proposed new Article 3 *bis* of the 1961 Convention, if the new Article 2 *bis* of the 1971 Convention were to apply to the prescription requirement in Article 9 under either Option 1 or 2, its effect would be that non-commercial supply or dispensation of small quantities of drugs to individuals for medical purposes would be exempt from the requirement. For the reasons noted above in relation to Article 30(2)(b) of the 1961 Convention, it is also suggested that the medical prescription requirement in Article 9 should apply in all cases where drugs are supplied or dispensed for medical use, and should not depend upon the quantity of drugs and/or commerciality of the supply.

The same amendments are proposed for the purposes of both Option 1 and Option 2 to achieve this: Article 9 would need to be exempted from the new Article 2 *bis* (as proposed above) so that Article 9 would continue to apply to supply or dispensation of small quantities of drugs for other than commercial purposes. In addition, Article 9 should be amended directly to make it clear that the medical prescription requirement only applies in relation to medical use of drugs.

#### 5.4.3. Options 1 and 2 – amendment of Article 9

In paragraph 1, insert the word ‘medical’ after ‘dispensed for’.

#### ARTICLE 9. PRESCRIPTIONS

The Parties shall require that substances in Schedules II, III and IV be supplied or dispensed for **medical** use by individuals pursuant to medical prescription only, except when individuals may lawfully obtain, use, dispense or administer such substances in the duly authorised exercise of therapeutic or scientific functions.

#### 5.5. Article 16(4) – statistical reports

#### ARTICLE 16 [EXISTING TEXT]

Reports to be Furnished by the Parties

...

4. The Parties shall furnish to the Board annual statistical reports in accordance with forms prepared by the Board:



- a) In regard to each substance in Schedules I and II, on quantities manufactured, exported to and imported from each country or region as well as on stocks held by manufacturers;
- b) In regard to each substance in Schedules III and IV, on quantities manufactured, as well as on total quantities exported and imported;
- c) In regard to each substance in Schedules II and II, on quantities used in the manufacture of exempt preparations, and
- d) In regard to each substance other than a substance in Schedule I, on quantities used for industrial purposes in accordance with subparagraph b) of article 4.

The quantities manufactured which are referred to in sub-paragraphs a) and b) of this paragraph do not include the quantities of preparations manufactured.

#### 5.5.1. General comments on Article 16(4)

Article 16 of the 1971 Convention is the main provision in the Convention requiring the provision of information by Parties to the Commission on Narcotic Drugs of the UN Economic and Social Council and the INCB.

The 1971 Commentary explains that Article 16 occupies the same position under the 1971 Convention as Articles 18 (information to be furnished by Parties to the UN Secretary-General), 12, 13 and 19 (estimates system), and 20 (statistical returns) of the 1961 Convention, but requires the provision of less extensive information than required under those provisions of the 1961 Convention. In particular, the 1971 Convention does not require Parties to provide estimates of their requirements and/or expected production of psychotropic substances each year.<sup>202</sup>

Article 16(4) of the 1971 Convention corresponds with Article 20 of the 1961 Convention. It requires Parties to furnish annual statistical reports to the INCB on manufacture,<sup>203</sup> import and export of each Schedule I, II and III substance, on stocks held by manufacturers of each Schedule I substance, and on quantities of each Schedule II and III substance used to manufacture 'exempt preparations'.<sup>204</sup> It also requires Parties to

<sup>202</sup> 1971 Commentary, p. 277.

<sup>203</sup> The last sentence of article 16(4) states that the figures on manufacture which Parties must furnish to the INCB under subparagraphs (a) and (b) do not include quantities of preparations manufactured.

<sup>204</sup> Exempt preparations are preparations which have been exempted from the control measures in the 1971 Convention in accordance with article 3 of the Convention because they present no or negligible risk of abuse, and because psychotropic substances cannot be readily recovered from them in a quantity sufficient for 'abuse', due to the manner in which they have been compounded: article 3(2).

provide statistical reports on the quantities of each Schedule II, III and IV substance used for industrial purposes (in accordance with Article 4(b)).

The INCB examines the statistical information for purposes including to determine the extent to which they indicate that a Party is complying with the Convention, and whether there is evidence of diversion from licit to illicit markets.<sup>205</sup>

#### 5.5.2. Option 2 – changes to Article 16(4)

For the purposes of Option 2, it is proposed that Article 16(4) be amended to require Parties to furnish separate statistical reports on the quantities of substances manufactured, used in the manufacture of exempt preparations, imported or exported, for both medical/scientific purposes and non-medical/non-scientific purposes. This would be consistent with the proposed changes to Article 20 of the 1961 Convention under Option 2 (discussed in section 4.8 above) to require separate provision of statistical returns in relation to medical/scientific and non-medical/non-scientific markets. Furnishing of separate statistical reports in relation to manufacture, import and export for medical/scientific purposes and for non-medical/non-scientific purposes would enable the INCB to more effectively monitor both medical/scientific and non-medical/non-scientific domestic markets in psychotropic substances, identify diversion from licit markets to illicit markets, and assess whether or not countries or regions manufactured adequate quantities of psychotropic substances to meet their medical and scientific needs, following the proposed changes under Option 2.

#### 5.5.3. Option 2 – amendment of Article 16(4)

The following amendments should be made to Article 16(4):

1. In subparagraph (a):

- a) after 'Schedules I and II, on', insert a colon
- b) on a new line, for the remainder of the subparagraph, substitute:
  - 'i) quantities manufactured for medical and scientific purposes, and other purposes;
  - ii) stocks held by manufacturers for medical and scientific purposes, and other purposes;
  - iii) quantities exported to and imported from each country or region for medical and scientific purposes, and other purposes;'

2. In subparagraph (b):

<sup>205</sup> 1971 Commentary, pp. 289–290.

- a) after 'Schedules III and IV, on', insert a colon;
  - b) on a new line, for the remainder of the subparagraph, substitute:
    - i) quantities manufactured for medical and scientific purposes, and other purposes; and
    - ii) total quantities exported and imported for medical and scientific purposes, and other purposes;'
3. In subparagraph (c), after 'preparations', insert 'for medical and scientific purposes, and other purposes'.

## ARTICLE 16

### Reports to be Furnished by the Parties

...

4. The Parties shall furnish to the Board annual statistical reports in accordance with forms prepared by the Board:

a) In regard to each substance in Schedules I and II, on: ~~on quantities manufactured, exported to and imported from each country or region as well as on stocks held by manufacturers:~~

- i) quantities manufactured for medical and scientific purposes, and other purposes;**
- ii) stocks held by manufacturers for medical and scientific purposes, and other purposes;**
- iii) quantities exported to and imported from each country or region for medical and scientific purposes, and other purposes;**

b) In regard to each substance in Schedules III and IV, on: ~~quantities manufactured, as well as on total quantities exported and imported~~

- i) quantities manufactured for medical and scientific purposes, and other purposes; and**
- ii) total quantities exported and imported for medical and scientific purposes, and other purposes;**

c) In regard to each substance in Schedules II and III, on quantities used in the manufacture of exempt preparations **for medical and scientific purposes, and other purposes, and**

d) In regard to each substance other than a substance in Schedule I, on quantities used for industrial purposes in accordance with subparagraph b) of article 4.

The quantities manufactured which are referred to in sub-paragraphs a) and b) of this paragraph do not include the quantities of preparations manufactured.

## 5.6. Article 22 – obligation to criminalise actions

### ARTICLE 22 [EXISTING TEXT]

#### Penal Provisions

1. a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.

b) Notwithstanding the preceding sub-paragraph, when abusers of psychotropic substances have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to punishment, that such abusers undergo measures of treatment, education, after-care, rehabilitation and social integration in conformity with paragraph 1 of article 20.

...

#### 5.6.1. General comments on Article 22

Article 22 of the 1971 Convention requires Parties to establish as punishable offences any actions that are contrary to laws or regulations that Parties must adopt in order to fulfil their obligations under other provisions of the Convention. Article 22(1)(a) corresponds to Article 36(1)(a) of the 1961 Convention,<sup>206</sup> and imposes very similar substantive

<sup>206</sup> The two provisions are different in form in that subparagraph 1(a) of Article 22 uses a general formula in describing the actions that Parties must treat as punishable offences (actions ‘contrary to a law or regulation adopted in pursuance of its obligations under this Convention’), whereas subparagraph 1(a) of Article 36 specifically enumerates the actions that Parties must make punishable offences if contrary to the provisions of the 1961 Convention, and combines this with a catch-all formula to cover any other action which a Party judges may be contrary to the Convention. This change in drafting approach was in recognition of the fact that the 1961 and 1971 Conventions are non-self executing, and offences must be established under national law rather than directly by the Conventions: 1971 Commentary, pp. 346–7.

obligations on Parties in respect of psychotropic substances as that provision imposes in respect of narcotic drugs. (See discussion of Article 36 above.)

Like Article 36(1)(a), Article 22(1)(b) allows Parties to provide for ‘abusers’ of psychotropic substances to undergo measures of treatment, education, after-care, rehabilitation and social integration as an alternative or in addition to punishment for the offences described in Article 22 (1)(b).

As with Article 36, the obligations imposed by Article 22 must be interpreted by reference to Parties’ general obligations under the 1971 Convention. Actions which are prohibited as required by Articles 5 and 7, or undertaken other than in compliance with the control measures in Articles 5 and 7, must be made punishable offences under Article 22(1)(a).

Therefore, by virtue of Article 5 of the Convention, Parties are required to penalise the manufacture, export, import, distribution and stocks of, and trade in, Schedule II, III and IV substances for other than medical and scientific purposes (other than according to the exceptions in Article 4), and by virtue of Article 7, they are required to penalise the manufacture, distribution, import and export of, and trade in, Schedule I substances for other than scientific and very limited medical purposes and other than in accordance with the control measures in Article 7(b) and/or (f).

It seems clear that Article 22(1)(a) does not require Parties to make possession of Schedule II, III or IV substances for personal use a punishable offence, as Article 5(3) merely provides that it is ‘desirable’ that Parties do not permit such possession except under legal authority. This could be interpreted as requiring Parties to criminalise simple possession of these substances only if they elect to prohibit such possession, but allowing Parties to elect to do neither. However, it is submitted that the better view is that it does not require Parties to criminalise simple possession, irrespective of whether they elect to prohibit such possession through other measures (e.g. administrative measures), since possession would not be contrary to a law or regulation adopted in pursuance of Parties’ *obligations* under the Convention.<sup>207</sup> On this basis, it appears to follow that Parties are not required to prohibit or penalise personal *use* of the substances (as it is unlikely that the intention would have been to require Parties to penalise personal use but not possession for this purpose).<sup>208</sup> Boister notes that the obligation in

<sup>207</sup> 1971 Commentary, p. 350; Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 94.

<sup>208</sup> The 1971 Commentary argues at 349–50 that personal acquisition and acquisition for personal consumption of psychotropic substances are ‘actions’ for the purposes of article 22(1)(a), but cannot be actions ‘contrary to a law or regulation adopted in pursuance of’ a Party’s obligation under the Convention. Both consumption and acquisition necessitate possession of the substances; therefore, whether persons who consume or acquire substances for this purpose must be treated as offenders depends on whether possession of the substances for this purpose is an offence under article 22(1)(a). See also Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 93, footnote 97.

Article 5(2) to limit by appropriate measures the use and possession of Schedule II, III or IV substances to medical and scientific purposes causes uncertainty, but argues that Parties must be allowed to use non-penal measures to limit these actions in order to reconcile Article 5(2) with Article 5(3).<sup>209</sup>

It is uncertain, however, whether personal use or simple possession of *Schedule I substances* must be penalised. As noted above, the ordinary meaning of Article 7(a) of the Convention indicates that *all* use of Schedule I substances, other than scientific or very limited medical use in the circumstances defined in that article, must be prohibited. This would include personal non-medical use of the substances. The 1971 Commentary states that Article 22 was intended to deal with illicit traffic in psychotropic substances rather than to require punishment of the users of such substances, but it notes that the ordinary meaning of Article 22(a) does not indicate that actions that are not part of illicit traffic in the substances are intended to be excluded from its operation.<sup>210</sup>

Under Article 7(b), Parties must require a 'special licence or prior authorisation' for possession of Schedule I substances. Boister notes on the one hand that this suggests Parties are obliged to prohibit possession other than under such authorisation, but on the other that it is arguable that the whole tenor of Article 7 indicates that it is directed to possession for the purpose of trafficking.<sup>211</sup>

It is also unclear whether 'possession' is an 'action' for the purposes of Article 22(1)(a). The 1971 Commentary acknowledges that the ordinary meaning of possession may suggest that it is not. It argues, however, that 'possession' as used in the 1971 Convention means having actual control or power over the substances, including the whole process of holding the substance, and would therefore include such actions as preserving, hiding or moving the substance from place to place.<sup>212</sup> On this basis, the Commentary argues that possession of Schedule I substances for personal use is an action that must be made a punishable offence under Article 22(1)(a).<sup>213</sup>

Whether or not possession of Schedule 1 substances is an action, the Commentary suggests that possession of such substances for the purposes of trade would in all cases involve acquisition of the substances. Such acquisition would be an action in 'trade' in the substances, and therefore an action under Article 22(1)(a), or at least an act in preparation for trade for the purposes of Article 22(2)(a)(ii) (which requires Parties to penalise preparatory acts in connection with Article 22 offences).<sup>214</sup> Acts in trade in

<sup>209</sup> Boister, 2001, p. 94.

<sup>210</sup> 1971 Commentary, p. 350.

<sup>211</sup> Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 94.

<sup>212</sup> 1971 Commentary, p. 351.

<sup>213</sup> United Nations. *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs*, 1961, New York: United Nations, 1976, p. 58.

<sup>214</sup> 1971 Commentary, 350.

Schedule I substances must be prohibited except for scientific or very limited medical purposes under Article 7, and must therefore be penalised under Article 22(1)(a).

#### 5.6.2. Option 1 – changes to Article 22

As discussed, the proposed new Article 2 *bis* would have the effect of excluding non-commercial actions involving small quantities of psychotropic substances from the scope of the Convention (other than from Article 7(a) and Article 9). It would, therefore, ensure that Parties would not be obliged under Article 22 to make any non-commercial actions with respect to small quantities of psychotropic substances punishable offences, and would resolve the uncertainty as to whether Parties are required to penalise personal use and simple possession of psychotropic substances (in so far as this involves small quantities of substances).

No further amendment of Article 22 would be required for the purposes of Option 1.

#### 5.6.3. Option 2 – changes to Article 22

Under Option 2, the proposed amendments of Articles 5 and 7 discussed above would mean that manufacture, distribution, trade, import, export, possession and use of psychotropic substances for other than medical or scientific purposes would no longer be contrary to laws or regulations that Parties would be required to adopt in order to fulfil their obligations under the Convention if such activities were in compliance with applicable control measures in Articles 7 and 8. Accordingly, Parties would not be required to make these activities punishable offences under Article 22, except activities in contravention of applicable control measures.

In addition, as under Option 1, the proposed new Article 2 *bis* would exempt activities involving small quantities of psychotropic substances for other than commercial purposes from the provisions of the Convention, other than from the control measures for medical or scientific use of Schedule I substances in Article 7(a) and Article 9. Consequently, Parties would not be required under Article 22 to make these activities punishable offences in any circumstances (other than medical or scientific use of the substances contrary to laws or regulations adopted in accordance with Article 7(a), or medical supply other than under a prescription contrary to laws or regulations adopted in accordance with Article 9).

Therefore, no amendments of Article 22 would be required under Option 2 to relieve Parties from their obligations under that provision to establish as punishable offences non-medical and non-scientific manufacture, distribution, trade, possession and use of psychotropic substances, and non-commercial use of small quantities of psychotropic substances and related activities.

## 6. CHANGES TO THE 1988 CONVENTION – OPTIONS 1 AND 2

### 6.1. Article 3(1) – criminal offences

#### ARTICLE 3 [EXISTING TEXT]

##### Offences and Sanctions

1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

- (a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drugs or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.
- (ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
- (iii) The possession or purchase of any narcotic drug or psychotropic substance for the purposes of any of the activities enumerated in (i) above;
- (iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
- (v) The organisation, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above
- (b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;
- (c) (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in



accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;

- (ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
- (iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;
- (iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provision of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

### 6.1.1. General comments on Article 3

#### *Article 3(1)*

Article 3(1) of the 1988 Convention was intended to require Parties to criminalise and punish all forms of participation in illicit traffic in narcotic drugs or psychotropic substances, when undertaken intentionally.

Article 3(1)(a) repeats the standard actions related to the production and supply of drugs that Parties are required to make punishable offences under earlier conventions, with some additions. As noted above, the 1961 Convention and 1971 Convention are not self-executing, and do not in themselves prohibit any conduct. According to the 1988 Commentary, therefore, the references in Article 3(1)(a) to the 1961 Convention, the 1961 Convention as amended and the 1971 Convention were intended to incorporate by reference the schemes in those conventions with respect to particular categories of narcotic drugs and psychotropic substances, and ensure that Parties were obliged to criminalise and punish the listed forms of conduct only in circumstances which would attract the obligations of parties to the earlier conventions. Accordingly, Article 3(1)(a) must be interpreted by reference to the earlier conventions, whether or not a Party to the 1988 Convention is a party to the earlier conventions. However, only the forms of conduct enumerated in Article 3(1)(a) must be made criminal offences. Parties are

obliged to establish the actions enumerated in Article 3(1) as criminal offences, not regulatory infractions or administrative offences.<sup>215</sup>

The forms of conduct listed in Article 3(1)(a) include almost all of those enumerated in Article 36(1) of the 1961 Convention, and the discussion of Article 36(1) above applies also to Article 3(1)(a). Of those actions, 'cultivation' (of the opium poppy, coca bush or cannabis plant to produce narcotic drugs) and 'possession' and 'purchase' (of narcotic drugs or psychotropic substances for the purposes of any of the acts listed in subparagraph (i)) are listed separately in subparagraphs (ii) and (iii) of Article 3(i)(a), and 'possession', 'purchase' and 'cultivation' for personal consumption are listed in Article 3(2), in order to provide for the different treatment of those offences according to their purposes.

Article 3(2) (discussed below) deals with cultivation, possession and purchase of narcotic drugs and psychotropic substances for the purpose of personal consumption. This indicates that the thrust of Article 3(1) is to impose obligations on Parties to criminalise actions taken as part of, or for the purpose of, illicit trade in the drugs and substances, and that Article 3(1) is intended to deal with supply rather than demand. However, Parties may still be required to criminalise some of the actions enumerated in Article 3(1)(a) where undertaken for the purposes of non-commercial supply, that is, to provide drugs to others for their non-medical consumption without receiving pecuniary benefit or consideration. For example, as discussed in relation to Article 36, the enumeration of both 'offering' and 'offering for sale' in Article 3(1)(a)(i) indicates that the meaning of 'offering' must be limited to offering to provide drugs or substances without consideration (i.e. offering drugs as gifts). Article 3(1)(a)(iii) requires Parties to criminalise the possession or purchase of narcotic drugs or psychotropic substances for the purpose of any of the actions enumerated in Article 3(1)(a)(i), including offering. Therefore, possession and purchase for the purpose of offering to donate drugs or substances must also be criminalised under Article 3(1)(a).

Subparagraph (iv) of Article 3(1)(a) requires Parties to criminalise the manufacture, transport or distribution of equipment, materials, substances or chemicals in the knowledge that they are to be used in drug trafficking offences, and subparagraph (v) requires criminalisation of the organisation, management or financing of any of the offences in Article 3(1)(a).

Articles 3(1)(b) imposes additional obligations on Parties to create new offences relating to property conversion and the laundering of profits derived from offences under Article 3(1)(a). Article 3(1)(c) requires Parties to establish offences relating to property derived from, equipment, materials and substances used in, and participation, inchoate acts and complicity in drug trafficking (subject to the constitutional principles and basic concepts of the legal systems of Parties).

<sup>215</sup> 1988 Commentary, p. 50.

Article 3(1)(c)(iii) warrants special attention. It goes further than the earlier conventions and requires Parties to criminalise public incitements or inducements to commit Article 3 offences or to illicitly use narcotic drugs or psychotropic substances. The provision was intended to prevent promotion of drug use or supply in the media, based on concerns about media glorification of drug use and drug culture.<sup>216</sup> It requires Parties to criminalise inducements or incitements to commit any of the offences that must be established under Article 3, *or* to use narcotic drugs or psychotropic substances illicitly.<sup>217</sup> It has been suggested that provision of information and advice concerning drugs, including on-the-spot drug testing in nightclubs, may be contrary to Parties' obligations under Article 3(1)(c)(iii).<sup>218</sup>

### *Article 3(2)*

As noted above, Article 3(2) requires Parties to establish as criminal offences the intentional possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the 1961 Convention, the 1961 Convention as amended or the 1971 Convention. (Article 3(2) does not require criminalisation of personal use itself, however, as it is not possible to consume drugs without first possessing, purchasing and/or cultivating them.<sup>219</sup>)

Article 3(2) was intended to resolve the existing uncertainty as to whether Parties were required to criminalise possession, purchase or cultivation of narcotic drugs for personal consumption, and was included in the 1988 Convention following pressure from 'producer states' (e.g. Mexico), which argued that the Convention should address all aspects of the drug problem, including personal use, on the basis that 'consumer states' should also bear responsibility for illicit drug suppression.<sup>220</sup>

The Convention's separate treatment of personal use offences in Article 3(2) and supply offences in Article 3(1) was to provide for the differential application in later provisions of various obligations in respect of the more serious supply offences versus the less serious demand offences. Under Article 3(4)(a), Parties must impose sanctions, such as imprisonment, for Article 3(1) offences which take into account the grave nature of these offences. Obligations in relation to extraterritorial jurisdiction (Articles 4(1) and 4(2)), confiscation (Article 5(1)), extradition (Article 6(1)) and mutual legal assistance (Article 7(1)) also apply only to offences that must be established under Article 3(1).

<sup>216</sup> 1988 Commentary, p. 74.

<sup>217</sup> 1988 Commentary, p. 75.

<sup>218</sup> De Ruyver B, Vermeulen G, Vander Beken T, Vander Laenen F, Greenens K. *Multidisciplinary Drug Policies and the UN Drug Treaties*. Institute for Research on Criminal Policy, Ghent University. Antwerp: Maklu, 2002, p. 33.

<sup>219</sup> De Ruyver *et al.*, 2002, p. 20.

<sup>220</sup> Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 124.

The reference in Article 3(2) to the provisions of the earlier conventions could be interpreted as allowing Parties to apply the interpretation of those conventions as not requiring the criminalisation of simple possession. However, the 1988 Commentary submits that the express reference to 'personal consumption' in Article 3(2) clearly indicates that criminalisation of simple possession is required, and that the reference to earlier conventions was intended only to incorporate the schedules of controlled substances and the distinction between licit and illicit consumption (i.e. on the basis of whether consumption is for medical purposes) in those conventions.<sup>221</sup>

For the same reasons as discussed in relation to Article 22 of the 1971 Convention, it seems clear that Article 3(2) does not require Parties to criminalise simple possession of Schedule II, III and IV psychotropic substances, since Article 5(3) of the 1971 Convention provides that it is only 'desirable' that Parties do not permit possession of these substances except under legal authority.<sup>222</sup> In any case, the effect of the new Articles 2 *bis* and 3 *bis* of the 1961 Convention and 1971 Convention (respectively) would be that non-commercial, non-medical possession of small quantities of the substances would be exempt from the Convention. Parties would not be subject to any obligation or provided with any discretion under the Conventions to limit or prohibit non-commercial, non-medical possession of small quantities of any drugs or substances (which would cover most if not all cases of simple possession),<sup>223</sup> and therefore, would clearly not be required to criminalise such possession under Article 3(2).

Unlike Article 3(1), Article 3(2) is expressed to be subject to Parties' constitutional principles and the basic concepts of their legal systems. Courts in a number of countries have held that criminalisation of simple possession of small quantities of drugs is unconstitutional.<sup>224</sup> It is unclear whether legislation decriminalising possession, purchase or cultivation of drugs for personal use could be considered part of the 'basic concepts' of a Party's legal system. The INCB has expressed the view that it could not.<sup>225</sup> However, the fact that Article 3(2) is expressed to be subject to this general exemption whereas Article 3(1) is not suggests that Parties have some degree of latitude to decide not to criminalise the actions set out in Article 3(2) where this can be argued to be in accordance with Parties' basic legal principles.<sup>226</sup>

<sup>221</sup> 1988 Commentary, p. 81.

<sup>222</sup> Boister N. *Penal Aspects of the UN Drug Conventions*. The Hague/London/Boston: Kluwer Law International, 2001, p. 128.

<sup>223</sup> Parties could still decide to prohibit non-commercial possession of small quantities of drugs, but this would not be by virtue of or in accordance with any provisions of the Conventions.

<sup>224</sup> Boister, 2001, p. 125.

<sup>225</sup> Boister, 2001, p. 127, footnote 229.

<sup>226</sup> Dorn N, and Jamieson A. *Room for Manoeuvre: Overview of comparative legal research into national drug laws of France, Germany, Italy, Spain, the Netherlands and Sweden and their relation to three international drugs conventions*. London: Drugscope (for The Independent Inquiry on The Misuse of Drugs Act 1971, London), 2000. For example, Italian legal experts have expressed the view that punishment of actions (such as drug possession) that do not injure other people's rights is inconsistent with Article 8

### 6.1.2. Option 1 – changes to the 1988 Convention

If non-commercial domestic actions in relation to narcotic drugs and psychotropic substances were removed from the scope of the 1961 Convention and 1971 Convention (respectively) as discussed above, there would not be any need for similar general restriction of the scope of the 1988 Convention for the purposes of Option 1. This is because Article 3 of the 1988 Convention only requires criminalisation of the enumerated actions where they are contrary to laws or regulations adopted to fulfil a Party's obligations under the provisions of the 1961 Convention, the 1961 Convention as amended and/or the 1971 Convention. The effect of the proposed new articles in the 1961 Convention as amended and the 1971 Convention would be that actions taken for other than commercial purposes and involving only small quantities of drugs or substances would no longer be contrary to those Conventions.

All the provisions of Article 3 are expressed to apply where actions are contrary to the provisions of the earlier conventions, or where they relate to or involve the *illicit* cultivation, production, manufacture or use of narcotic drugs or psychotropic substances, or the commission of offences established in accordance with Article 3(1) or (2). 'Illicit traffic' is defined in Article 1(m) as the offences in Article 3(1) and (2), and it seems clear that other uses of 'illicit' were intended to refer to actions contrary to laws or regulations adopted in accordance with the 1988 Convention or the earlier conventions. Therefore, it seems clear that by virtue of the new provisions in the 1961 and 1971 Conventions, Parties to the 1988 Convention (with the possible exception of Afghanistan and Chad<sup>227</sup>) would no longer be required to criminalise actions taken for other than commercial purposes in relation to small quantities of drugs under Article 3 of the 1988 Convention.

A summary of the basic aims of the remaining obligations in the 1988 Convention is set out below.

- Establishment of extra-territorial jurisdiction over Article 3(1) offences – Article 4.
- Confiscation of processed derived from, and equipment, material or substances used in, Article 3(1) offences – Article 5.

of the European Convention of Human Rights (which protects the right to respect for private and family life).

<sup>227</sup> It should be noted that the new Article 3 *bis* would be added to the 1961 Convention as amended by the 1972 Protocol, and not the unamended 1961 Convention. Afghanistan and Chad are the only two states that are Parties to the 1961 Convention and not the 1972 Protocol amending the 1961 Convention. Accordingly, they may not be subject to the exemption created by the new Article 3 *bis* of the 1961 Convention as amended, unless they specifically accede to the proposed changes. However, as noted, the 1988 Commentary states that Article 3(1)(a) must be interpreted by reference to the earlier conventions, including by Parties that are not signatories to the earlier conventions. Therefore, arguably Afghanistan and Chad would still be entitled to interpret Article 3(1)(a) by reference to the 1961 Convention as amended, even though they have not acceded to that Convention, and would no longer be required under Article 3(1)(a) to criminalise non-commercial domestic actions with respect to small quantities of drugs.

- Extradition of Article 3(1) offenders – Article 6.
- Mutual legal assistance in investigating, prosecuting and proceedings in relation to Article 3(1) offences – Article 7.
- Transfer of proceedings with respect to Article 3(1) offences – Article 8
- Other forms of international cooperation to suppress the commission of Article 3(1) offences – Article 9.
- International cooperation and assistance for transit states (states through which illicit drugs and substances are moved) – Article 10.
- Controlled delivery (i.e. allowing movement of illicit drugs or substances through or between territories under supervision of authorities) with a view to identifying persons involved in Article 3(1) offences – Article 11.
- Prevention of the diversion of substances for the illicit manufacture of narcotic drugs or psychotropic substances – Article 12.
- Prevention of trade in and diversion of materials and equipment for illicit production or manufacture of narcotic drugs and psychotropic substances – Article 13.
- Measures to eradicate illicit cultivation of plants containing narcotic or psychotropic substances – Article 14.
- Prevention of the use of commercial carriers as means of transport in the commission of Article 3(1) offences – Article 15.
- Documentation and labelling of lawful exports of narcotic drugs and psychotropic substances – Article 16.
- Suppression of illicit traffic by sea – Article 17.
- Suppression of illicit traffic in free trade zones and ports – Article 18.
- Suppression of the use of mail for illicit traffic – Article 19.
- Furnishing of information by Parties to the Commission on Narcotic Drugs of the UN Economic and Social Council on implementation of the Convention and cases of illicit traffic – Article 20.

These obligations all apply to: offences established in accordance with Article 3; ‘illicit traffic’ in drugs and substances; ‘illicit’ cultivation, production, manufacture or use of drugs and substances; or lawful exports of drugs and substances. The effect of the new provisions in the 1961 and 1971 Conventions would be that non-commercial actions involving small quantities of drugs or substances would no longer be offences under Article 3 or ‘illicit’. Therefore, Parties would no longer be subject to any obligations under these provisions to prohibit or restrict such actions.

Since Article 3(2) only applies to possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption where contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention, it is clear that Parties would no longer be obliged to criminalise those actions following the inclusion of the new provisions in the 1961 Convention as amended and the 1971 Convention. However, since the sole intention of Article 3(2) was to require Parties to criminalise actions undertaken for the purpose of simple use of drugs, retention of the provision would be contrary to the aims of Option 1 of the Project and may give rise to

uncertainty. Accordingly, Article 3(2) should be deleted from the Convention under Option 1. Article 3(4)(d) provides for the provision of measures for treatment, education, aftercare, rehabilitation or social integration as an alternative or in addition to conviction or punishment of an offence established in accordance with Article 3(2), and would no longer make sense following the removal of Article 3(2). Accordingly, 3(4)(d) should be amended to remove the reference to Article 3(2), but to make it clear that Parties that still elect to criminalise actions relating to personal use of drugs would continue to be entitled to provide for such measures in addition, or as alternatives, to conviction or punishment.

Similarly, the definition of 'illicit traffic' in Article 1(m) of the 1988 Convention (noted above) refers to Article 3(2) and would also need to be amended.

### 6.1.3. Option 1 – amendment of the 1988 Convention

The following amendments should be made to Article 1(m):

1. For 'paragraphs' substitute 'paragraph'
2. Delete 'and 2,'

The following amendments should be made to Article 3:

1. Delete paragraph 2.
2. In paragraph (4)(d):
  - a) for 'an offence', substitute 'any offence with respect to narcotic drugs or psychotropic substances'
  - b) for 'in accordance with paragraph 2' substitute 'other than as required by paragraph 1'.

## ARTICLE 1. DEFINITIONS

...

(m) "Illicit traffic" means the offences set forth in Article 3, ~~paragraphs~~ **paragraph 1 and 2**, of this Convention

## ARTICLE 3. OFFENCES AND SANCTIONS

...

~~2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence~~

~~under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provision of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.~~

...

4.

...

d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of ~~an~~ **any offence with respect to narcotic drugs or psychotropic substances** established ~~in accordance with paragraph 2~~ **other than as required by paragraph 1** of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

#### 6.1.4. Option 2 – changes to the 1988 Convention

As discussed above, the provisions of Article 3 are expressed to apply where actions are contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention – meaning contrary to laws or regulations Parties would be required to adopt under the provisions of those Conventions, or where they relate to or involve the illicit cultivation, production, manufacture or use of narcotic drugs or psychotropic substances, or the commission of offences established in accordance with Article 3.

The effect of the proposed amendments to the 1961 Convention and the 1971 Convention under Option 2, discussed above, would be that none of the actions listed in Article 3(1)(i) or (ii) or Article 3(2) of the 1988 Convention would be contrary to the provisions of the 1961 Convention or the 1971 Convention, whether for medical/scientific purposes or other purposes, so long as they were in compliance with any control measures that Parties would be required to apply under the Conventions (e.g. under Articles 23, 26 and 28-31 of the 1961 Convention, and Articles 7, 8 and 9 of the 1971 Convention). In addition, as under Option 1, non-commercial activities involving only small quantities of drugs or substances would be exempt from the provisions of the Conventions (except that medical or scientific use of drugs or substances would still be subject to Article 30(2)(b) of the 1961 Convention or Articles 7(a) and 9 of the 1971 Convention).

Accordingly, Parties (with the possible exception of Afghanistan and Chad<sup>228</sup>) would no longer be required to make these activities criminal offences under Articles 3(1)(i), 3(1)(ii) or 3(2) of the 1988 Convention, except where they were other than in compliance with applicable control measures, and these activities would no longer be ‘illicit’.

<sup>228</sup> 1988 Commentary, p. 50. The same issues arise under Option 2.



Consequently, Parties would also no longer be required to criminalise preparatory or inchoate acts, forms of participation in or other acts related to these activities under the other provisions of Article 3, or to comply with any of the remaining obligations under the 1988 Conventions (e.g. in relation to jurisdiction, extradition and confiscation) as they relate to these activities.

Therefore, there would not be any technical need to amend Article 3 of the 1988 Convention. However, similar to Article 36(1) of the 1961 Convention, Articles 3(a)(1)(i) and (ii) list a number of actions that are not referred to in the 1961 Convention or the 1971 Convention, which may give rise to uncertainty as to the circumstances in which those actions would be considered to be contrary to the provisions of those Conventions. For the same reasons as discussed in relation to Article 36(1) in Article 6.17, there does not appear to be any need for these or other actions to be specifically listed in Articles 3(a)(1)(i), (ii) or (iii). Accordingly, it is also proposed that the approach in Article 22 of the 1971 Convention (discussed above) should be followed, and that the specific actions listed in Articles 3(a)(1)(i), (ii) and (iii) should be replaced with a general reference to any action contrary to a law or regulation adopted in pursuance of a Party's obligations under the Convention.

Finally, it is proposed that Article 3(2) should be removed from the 1988 Convention, for the same reasons as discussed above in relation to Option 1, and that the definition of 'illicit traffic' in Article 1(m), and Article 3(4)(d), should be amended in the same ways and for same reasons as discussed above in relation to Option 1.

#### 6.1.5. Option 2 - amendment of the 1988 Convention

The following amendments should be made to Article 1(m):

1. for 'paragraphs' substitute 'paragraph'; and delete 'and 2'.

The following amendments should be made to Article 3:

1. In subparagraph (a)(i):
  - a) for 'The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drugs or any psychotropic substance', substitute 'Any action'
  - b) after 'contrary to', insert 'a law or regulation adopted in pursuance of its obligations under'.
2. Delete:
  - a) subparagraph (a)(ii)
  - b) subparagraph (a)(iii)

- c) paragraph 2.
3. In paragraph (4)(d):
- a) for 'an offence', substitute 'any offence with respect to narcotic drugs or psychotropic substances'; and
  - b) for 'in accordance with paragraph 2', substitute 'other than as required by paragraph 1'.

#### ARTICLE 1. DEFINITIONS

Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout this convention:

...

m) "illicit traffic" means the offences set forth in Article 3, ~~paragraphs~~ **paragraph 1 and 2**, of this Convention.

#### ARTICLE 3. OFFENCES AND SANCTIONS

1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

a) (i) ~~The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drugs or any psychotropic substance~~ **Any action** contrary to **a law or regulation adopted in pursuance of its obligations under** the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

~~— ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;~~

~~— iii) The possession or purchase of any narcotic drug or psychotropic substance for the purposes of any of the activities enumerated in (i) above;~~

...

~~2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provision of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.~~

...

4. d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of ~~an offence~~ **any offence with respect to narcotic drugs or psychotropic substances** established ~~in accordance with paragraph 2~~ **other than as required by paragraph 1** of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.